DECISIONS

OF THE

SUDDER DEWANNY ADAWLUT,

RECORDED

IN CONFORMITY WITH ACT XII. 1843,

IN

1861.

WITH INDEXES TO NAMES OF PARTIES, AND THE CAUSES OF ACTION AND PRINCIPAL POINTS TOUCHED UPON IN THE DECISIONS FROM JANUARY TO JUNE 1861.

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TO

NAMES OF PARTIES.

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TO

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Defendants, who are widows of Hussein Ally, claimed the property as their dower, and Woomdutoonnissa, one of the defendants alleging, that Nujjumoonnissa was a *Sheah* contended that Shumsoonnissa a *Soonee*, had no claim to the deceased's property, her husband and mother being the only legal heirs. While the cases were pending Shumsoonnissa was substituted as representative for the plaintiffs Ahmed Ally and Kurrumoonnissa in the suits instituted by them, the former having sold his rights and interests to Shumsoonnissa, and the latter having died leaving Shumsoonnissa her sole heir.

The principal sudder amen disposed of all these cases as one, and under instructions of this Court, took no notice of the issue raised by Woomdutoonnissa as to the course of inheritance prevailing among the *Sheahs* and *Soonees*, and disposed of the suit as governed by the *Soonee* law, giving Shumsoonnissa six annas as her own right, six as representative of Ahmed Ally, but rejecting her claim to four annas as representative of Kurrumoonnissa, as he held that Kurrumoonnissa who had previously for herself and as guardian for her daughters executed an ikrarnamah, admitting the right of the defendants to this money as their dower, was estopped by her own act. Six appeals were preferred. The Court rejected the two preferred by Ashrufoonnissa who claimed dower, also the appeal of Shumsoonnissa, holding the decision of the principal sudder ameen in regard to Kurrumoonissa's claim to be correct, and as Woomdutoonissa withdrew her three appeals, the question as to the course of inheritance, as Nujjumoonissa was found to be a *Sheah* or *Soonee* was no longer before the Court, and the decision of the principal sudder ameen was affirmed ... 71

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DECISIONS

OF THE

SUDDER DEWANY ADAWLUT,

RECORDED

IN CONFORMITY WITH ACT XII. 1843.

THE 3RD JANUARY 1861.

H. T. RAIKES, C. B. TREVOR, and G. LOCH, Esqs., Judges.

Case No. 243 of 1860.

Regular appeal from the decision of Moulvee Yatazad Hossein, Deputy Collector of Nuddea, dated the 6th May 1860.

Mr. Robert Larmour, (one of the Defendants,) *Appellant,*

versus

Rajkishen Mitter and others, (Plaintiffs,) and others, (Defendants,) *Respondents.*

Mr. R. T. Allan and *Baboo Chundernath Chatterjee*, for appellant.

Baboos Kishenkishore Ghose, Ramapersaud Roy, and *Sumbhoonath Pundit*, for respondents.

a. g.

Suit laid at Co.'s Rs. 8,606-4-10.

Held, that under section 30, Act X. of 1859, and Act LIII. of 1860, when read together, if the cause of action in suits pending before it arose before the passing of Act X. of 1859, and at such a period as under the old law of limitation to

THE plaintiffs in this case, Hurrypersaud Mitter and others, sued Mr. Larmour, the manager, on behalf of the Bengal Indigo Company and others, for the recovery of possession of a mouroosee jote belonging to them, from which they had been illegally ejected by the defendant.

The defendant in his answer denied the plaintiffs' title and their dispossession by him, but pleaded, that as plaintiffs had refused to appear to enter into a settlement when called upon to do so, the lands had been settled according to law with other tenants.

The deputy collector laid down two issues. 1st, Is the jumma in dispute, the mouroosee of the plaintiff's? 2nd, Have plaintiff's been dispossessed by Mr. Larmour?

leave *more* than two years at that date, within which the suit might be brought, then that period is cut down to two years from the date of the passing of the Act or the 31st July 1861; whereas if the cause of action arose at a period so remote as to leave *less* than two years to run, at the period of the passing of Act X. of 1859, then the suit must be brought within a period answering to the period remaining under the old law of limitation; and under no circumstances can the period for suing in a case in which the cause of action arose before the passing of Act X. of 1859, be extended beyond 31st July 1861.

The deputy collector, for reasons into which it is unnecessary to enter, answered both issues in the affirmative, and decreed to plaintiffs, possession of their jote, with costs.

From the decision of the deputy collector an appeal has, under section 160, of Act X. of 1859, been now preferred to this Court by the defendant-below, and it is urged on his behalf by Mr. Allan, that as it appears from the plaint itself that a period of two years, 7 months and some days had elapsed since the date of the dispossession alleged by them, then, according to the provisions of section 30, of Act X. of 1859, the suit could not be heard, inasmuch as by that law all suits instituted under it must be commenced within the period of one year from the date of the accruing of the cause of action.

On the other side it was contended by Baboo Kishenkishore Ghose, that under Act LIII. of 1860, passed on the 26th December last, if the cause of action shall have accrued before the first day of August 1859, that is, the date on which Act X. of 1859 came into operation, such suit may be instituted within two years from that day; that the present suit was instituted on the 15th February 1860, and the cause of action arose in 1857; that consequently, under the law recently passed, plaintiff is within time, and the appeal should be dismissed.

The words of section 30, of Act X. of 1859, are: "Except, as otherwise provided, all suits instituted under this Act shall be commenced within the period of one year from the date of the accruing of the cause of action;" by Act LIII. of 1860, which is an Act to amend Act X. of 1859, it is enacted in section I., that the following provision shall be read as part of section 30, of Act X. of 1859, "If in any suit to which this section is applicable, the cause of action shall have accrued before the first day of August 1859, such suit shall be instituted within two years from that day, or, reckoning from the passing of this Act, within a period equal to the period of limitation for the institution of the suit that remained unexpired at the date of the passing of Act X. of 1859, provided that no such period shall extend beyond the 31st July 1861," and section 2, of the law enacts—"That any suit or appeal instituted under Act X. of 1859, which may have been dismissed or rejected on the ground that the suit had not been commenced within the period prescribed in section 30 of the said Act, may be revived if the order of dismissal or rejection shall be contrary to the provisions of the foregoing section, and a petition for the revival of the same shall be presented within 4 months of the passing of this Act, to the collector or court, by which suit or appeal may have been dismissed or rejected. The petition may be written on the stamp required for petition presented to such collector or court."

Now it is clear from this law, that *in all suits instituted under Act X. of* 1859, *and pending at the period of the passing of the last mentioned law,* if it appears that the cause of action arose before the passing of Act X. of 1859, and if the party suing had, under the old law which allowed him 12 years within which to sue, at the date of the passing of the abovementioned Act, viz., 31st August 1858, *more* than two years within which to sue, the period within which that right could be exercised, is cut down to two years from the passing of Act X. of 1859, or, in other words, limited to the 31st July 1861; whereas if the party suing had, at the time of the passing of Act X. of 1859, *less* than two years to run of the twelve years allowed to him by the old law within which to sue, he has from the passing of the Act a period allowed to him to sue equal to the period remaining to him under the old law within which he might have sued; but under no circumstance can the period for suing be *extended* to any one in either category *beyond* 31st July 1861.

Again, in *all suits already decided,* a provision for the revival of a suit is given to the court which has decided the suit, or in cases which have been appealed to the highest court in which the suit has been heard, if the application be made to such court within four months after the passing of the Act, that is, after the 26th December 1860, in cases which have been unappealed, the lower court will re-hear the case; in cases which have been appealed, the appellate court will remand the case for re-investigation if it appears that the plaintiff is within time according to the rule laid down in the Act.

The suit before the Court is still pending, and it is for the Court to apply to the present case the recent law which has been incorporated with Act X. of 1859. As then in the case before us the plaintiff's cause of action arose on the 18th Bhadun 1264, or 2nd September 1857, he had at the passing of the Act X. of 1859, nearly ten years under the old law, within which he might have sued, that period is curtailed to two years from the 1st August 1859, the date of the passing of Act X. of 1859, and as he sued on the 15th February 1860, only seven months subsequently, he is quite in time, and the objection of the appellant falls.

The appeal is therefore dismissed, and the order of the court below affirmed, but in consideration of the circumstances, that at the time of the preferring of the appeal, appellant was borne out by the law as it then stood, each party will bear his own costs in this Court.

THE 8TH JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Case No. 227 of 1860.

Regular appeal from the decision of Mr. W. J. Herschell, Acting Collector of Nuddea, dated 16th April 1860.

Birojamoyee Brahmonya, (Plaintiff,) *Appellant,*

versus

Messrs. Hill and Co., (Defendants,) *Respondents.*

Baboos Sumbhoonath Pundit and *Baneymadhub Banerjea,* for appellant.

Mr. R. T. Allan, and *Baboo Ramapersdud Roy* and *Aushootosh Dhur,* for respondents.

Suit laid at Co.'s Rs. 12,006-10-8.

Held, that the plaintiff who, with her co-sharers, gave a joint lease to the defendant, is not competent to sue alone for her individual share of the rents. Further, that the defendant was at liberty to pay his entire rents to any one or more of the parties who jointly gave him the lease.

THE plaintiff, appellant, instituted this suit before the collector, for the share of rents due to her upon a lease held by the defendant. It appeared that when the lease was given, the ikrar or engagement was drawn up in the name of Damoodur Roy for himself, and as guardian for Bunwaree Lal and Moorooleelal, and that of other sharers. It is allged, that Mooroolee died after he attained his majority, and that Bunwaree, also having become of full age, took upon himself the management of his affairs and continued so to do up to his death. The plaintiff, being the heir of these two persons, Bunwareelal and Mooroolee, sues in her right, for 1-3rd the stipulated rents of the farm held by the defendant.

The defendant pleaded that he had paid the rents in full, and that instead of suing him for her share of the same, the plaintiff should have sued her partners for any thing due to her on account of the rents.

The collector found, that from the receipts filed by the defendant, the rents had been fully paid according to agreement to the parties, who, under that deed, were entitled to the rents. He dismissed, therefore, the suit of the plaintiff against the defendant, and referred her to an action for settlement of accounts against her co-sharers.

The appeal to this Court is against this finding, and it is impugned on the ground, that even if the alleged payments had really been made, they were not payments to a party who had any right to receive them as on behalf of the plaintiff.

After hearing from the pleader for the appellant all the objections he had to urge against the payments, and the grounds upon which he maintained the plaintiff's right to receive her own share of the rents, it appears to us, that these arguments are thrown away, because the plaintiff has really no separate right of action. The ikrar is in favor of the sharers jointly, and a joint suit is the

only form in which action can legally be brought for the rents of the lease.

Sumbhoonath Pundit, the pleader for the appellant, endeavours to remove this objection to the suit on the argument, that though the ikrar stipulates for the payment of a particular lump sum to the proprietors generally, mention is at the same time made as to the extent of the shares of the several proprietors, and that each, therefore, was competent to sue for the amount individually due to each, but we cannot allow that this fact at all alters the nature of the contract, as it respects the proprietors and their lessee. The insertion in the ikrar of the proportionate interests of the several proprietors in the leased estate, will enable them, no doubt, to settle their accounts among themselves without difficulty, but that these particulars give any title to any of the sharers to sue the lessee separately for the share of the rents due to each, does not follow, and it is indeed quite opposed to the clear terms of the contract, which enable the lessee to make payment to one or other of them, payment made to one of them being made to him on his own account and as trustee for the others. Neither is it any argument in favor of the legality of the present suit, as it has been urged, that the defendant actually acknowledged the plaintiff's right to receive her separate share of the rents, for such a payment is according to the contract, and the defendant was justified in paying his rents to any of the joint sharers, they arranging for the adjustment of their shares among themselves.

The order of the collector which dismissed the plaintiff's suit, though on other grounds, is therefore confirmed, and the appeal is dismissed with costs.

THE 14TH JANUARY 1861.

C. B. TREVOR and G. LOCH, Esqs., Judges, and C. STEER, Esq., Officiating Judge.

Case No. 317 of 1858.

Regular appeal from the decision of Mr. E. S. Pearson, Additional Judge of Dacca, dated the 15th January 1858.

Musst. Nufeesa Khatoon, (Plaintiff,) *Appellant*,

versus

Mr. G. P. Wise and others, (Defendants,) *Respondents*.

Baboos Sumbhoonath Pundit and *Dwarkanath Mitter*, and *Mr. R. T. Allan*, for appellant.

Baboos Ramapershaud Roy and *Kishenkishore Ghose*, for respondents.

Suit laid at Co.'s Rs. 22,547-4.

Plaintiff suing to recover the share of her

THE plaintiff is the proprietor of an estate on the western bank of the Demissaree, and she sues to recover possession of 363-4-4-2

wife's portion of her father's estate, is met with a plea that the father disinherited her.

The plea not being established the suit was decreed.

of land on the western bank, which she affirms, are lands which originally belonged to her estate, but having been gradually cut away by the encroachment of the river, have re-formed on their original site on the opposite side of the river. The plaint further states, that a suit was instituted on the behalf of government to resume these new formed lands, but the special deputy collector finding that the plaintiff had not more land, both old and new, than what she was entitled to as the proper area of her original estate, released from the claim of resumption the lands which were in her possession. Having been since dispossessed from these by the defendant, she sues to recover possession.

The answer of Mr. Wise raised various pleas in bar, among which was one of limitation, and as respects the merits of the claim, he denied that the lands sued for were the restored lands of the plaintiff's estate, or that they were released as such by the resumption authorities; and he maintained that their position exactly corresponded with lands formerly held by him, which had for a time disappeared, but had again re-formed exactly where they were before.

It will be seen, therefore, that both parties claimed the lands on exactly identical grounds, each affirming, that the lands sued for, were lands once lost to their respective estate, and now re-formed on the very position they originally occupied.

The lower court rejected all the pleas in bar, but eventually, after trial upon the merits, pronounced that the plaintiff had never been in possession of the lands sued for, and consequently dismissed her claim under the statute of limitations.

The points for our decision are, whether the law of limitation applies to or affects the plaintiff's claim, and if the suit is to be decided on its merits, whether the plaintiff has established her right to the lands sued for.

JUDGMENT.

With respect to the two first points of enquiry we have to observe, that the suit is for lands which were professedly the subject of an enquiry by the resumption officers. Their proceedings show that the lands then under enquiry were claimed in part by the present plaintiff, and in whole by the present defendant.

The plaintiff claimed then, as she does now, 363-4-4-2, and as respects these, they were described by the resumption ameen who surveyed them, to be in the condition as follows:

236 kadas were distinguishable, but still partially under water.

56 kadas were in jungle, and

71 kadas were in cultivation under the defendants and others.

We hold that this report of the resumption ameen is good evidence as to the condition of the lands at the time of the decree of the

resumption court in 1847. The very object of the enquiry was to ascertain the estate of the lands, and as at the time there was no question between the parties to this suit which rendered a false description of the lands any benefit to either, there can be no ground to regard the ameen's account as otherwise than correct.

If then 236 kadas were not completely out of water, and 56 were lying waste, their very condition precludes the presumption that they were in the possession of any party, or that any one had exercised the right of ownership over them.

As twelve years have not elapsed from the time the lands were in this condition up to the date when this suit was instituted, or, in other words, as defendant has not shown a twelve years' possession on his part adverse to the plaintiff, the law of limitation offers no bar to the claim, which the plaintiff has made to these two portions of land, which must, therefore, be decided upon its merits.

With respect however to the 71 kadas shown by the same report to have been then in the occupation of Mr. Wise and others, as the plaintiff has given no proof that the above parties held these lands as tenants under her, she has clearly lost her right of action under the law of limitation.

With respect to that portion of the claim of which we have given our opinion that it is not effected by the law of limitation, we can only view it, though neither party have so viewed it, in connection with the common law of the country. The question then is, to whom do lands in the predicament described in the plaint, belong according to this law? Regulation XI. of 1825 is the law under which this question must be decided, and under it by no possibility, can she, plaintiff, establish her right to the lands sued for. Being on the other side of an unfordable stream, where they have gradually accreted, and where, by their very origin, all trace of their identity must have been lost, the plaintiff has no right to follow them, and they remain an addition to the estate of the party with whose lands they lie in contact.

Sumbhoonath Pundit, the pleader for the appellant, urges upon our consideration, that this case should be regarded as a special one, to which the provision of Regulation XI. of 1825, cannot be fitly applied, because (he argues) neither side have made any reference to this land in asserting their respective claims; that the case went to trial upon pleas altogether distinct from any consideration arising out of this law; that the law was equally overlooked by the resumption officer, who actually recognised the plaintiff as proprietor of lands on the eastern bank of the river, and as such, released to her the lands in suit; and the lower courts have, in like manner, alone looked to the pleas on either side, as those on which their respective claims were ultimately to stand or fall.

But we cannot allow, that the case is in any way a special one, which renders the application of the ordinary rule of law inapplicable to it, nor has any special or local custom been pleaded, which makes this an exceptional case. It is quite true, that neither the parties, nor the resumption officer, nor the judge in the lower court have applied the provisions of Regulation XI. of 1825, to the determination of the question involved in this case, but we cannot shut our eyes to this oversight, and as a particular law has been passed especially for the adjustment of disputes arising out of claims to alluvial formations, we are bound to decide the claim before us, which is one of this sort, according to this law, and any other course would not be legal.

On the ground, therefore, of limitation, we dismiss the claim of the plaintiff to 71 kadas, and, on the ground of the merits, we dismiss her claim to the remainder sued for, with all costs.

THE 16TH JANUARY 1861.

C. B. TREVOR and G. LOCH, Esqs., Judges, and C. STEER, Esq., Officiating Judge.

Case No. 324 of 1858.

Regular appeal from the decision of Mr. J. Weston, 2nd Principal Sudder Ameen of Tirhoot, dated the 22nd March 1858.

Moonshee Kalipershad and others, (Plaintiffs,) *Appellants*,

versus

Sheopershad and others, (Defendants,) *Respondents*.

Baboo Ramapersaud Roy and *Moonshee Ameer Ali*, for appellants.

Mr. R. T. Allan and *Baboo Kishenkishore Ghose*, for respondents.

Suit laid at Co.'s Rs. 7,733-5-6.

Held, that the plaintiff's right to redeem the mortgage ceased and determined after the period of one year from the date on which notice of foreclosure was served upon him, and that the right of the mortgagee then became absolute, and that as plaintiff's present suit is instituted more than twelve years

PLAINTIFFS sue for possession with mesne profits of a third share, that is, of 5-6-2-2 of Mouzah Bissenpore Bajah, which were mortgaged by their ancestor Manick Buksh Kalia, on the 26th August 1837, by their being declared entitled to redeem the same, and by the cancelment of the proceedings in foreclosure held under Regulation XVII. of 1806.

The defendants plead foreclosure of the mortgage, and possession under that foreclosure for a period of more than twelve years barring the plaintiff's right of suit.

The principal sudder ameen has declared plaintiffs out of court under the statute of limitations.

From that decision an appeal has now been preferred to this Court by the plaintiffs below, and the only point urged by Moonshee Ameer Ali on their behalf, is the inapplicability of the statute of limitation to the case.

The deed of conditional sale was executed by plaintiffs' ancestor on the 20th August 1837, on the 6th August 1842 notice of foreclosure is served, and on the 22nd of August of that year, the mortgagor gave a receipt in acknowledgment of the same, and on the 26th January 1857, the present suit is instituted.

Now it is quite clear, that the right of the plaintiffs to redeem the mortgaged property ceased and determined on the 23rd August 1843, that is, after one year from the receipt by the mortgagor of the service of the notice of foreclosure, when the right of the mortgagee to the mortgaged property became absolute.

From that date to the institution of the present suit, more than thirteen years have elapsed, and as there is nothing in the present suit to remove it from the operation of the ordinary law of limitation, we are clearly of opinion, that plaintiffs' present suit is by that statute barred.

We, therefore, affirm the judgment of the principal sudder ameen, with costs.

from that date, and there is nothing in the plaint to remove the suit from the operation of the ordinary law, plaintiff is cut of Court under the statute of limitations.

THE 16TH JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Case No. 259 of 1860.

Regular appeal from the decision of Mr. W. C. Grant, Deputy Collector of Hooghly, dated the 26th March 1860.

Thakoordass Gossain, (Plaintiff,) *Appellant,*

versus

Petumber Roy and another, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Obhoy Churn Bose,* for appellant.

Baboo Baneymadhub Banerjea, for respondents.

Suit laid at Company's Rupees 7,982-8-3.

THE plaintiff in this case, Thakoordass Gossain, zemindar of lot Hateesalah, Pergunnah Chomaha, sues Petumber Roy, the putneedar, and Hurreemohun Mookerjee, the party in possession, for arrears of rent due from 1261 to Ughrun 1266 B. Œ., with interest. He alleges that the defendant Hurreemohun has never paid him any rent at all, but has paid into the collectorate at different dates Rs. 29,856-11-2 only, on account of government revenue having been paid by plaintiffs, that deducting that amount from the whole sum due from Bysack 1261 up to Ughrun 1266, viz., 36,005, there remains due 6,415-15-18 as principal and 1,566-8-5 interest, altogether 7,982-8-9, that consequently this suit is brought for the recovery of the same.

Plaintiff claims for rents of 1264, 1265, and 1266, with interest from the commencement of the year following that on which the balance is accrued, up to the date of suit decreed, to him as a consolidated sum, with certain deductions on account of sums

deposited in court on two different dates, and interest on the sum remaining due after such deduction to the date of realization. Costs in proportion.

The defendant, Petumber Roy, has not appeared, but Hurreemohun Mookerjee, who has appeared, has purchased the putnee talook from him, and filed an answer to the effect, that the sum of Rs. 6,149-11-16 alone remains due after deducting the sum paid into the collectorate; that he, plaintiff, has wrongly included Rs. 2,676 within his claim, by calculating rent up to Ughrun 1266, at 12 monthly instalments instead of according to the instalments entered in the kubooleut of his, defendant's vendor, Petumber Roy; that moreover, he on the 20th Poos, deposited Rs. 2,300 in the collectorate, and that he is entitled to a deduction of the amount, together with 8 annas, on account of the stamp paper on which his petition was engrossed; that the balance due to the plaintiff is only 3,889-3-16, and that he is ready to deposit the same; he therefore prays, that the court, on receipt of the same amount from him, will order the payment of the same to plaintiff, and exonerate him from the unjust demand of plaintiff, and for interest and costs.

The deputy collector gave plaintiff only a partial decree, and he declared each party liable to pay his own costs.

From the decision of the deputy collector, an appeal has now been preferred to this Court by the plaintiff below, he urges, 1st, that the decree of the deputy collector is vague and defective, inasmuch as it does not mention, what exact sum out of the amount claimed, is decreed in his favour, and 2nd, that the order of the deputy collector, that each party should pay his own costs, is unjust and contrary to the practice of the court, according to which he is entitled to cost on the amount decreed.

The present dispute is one simply of account between the parties before us, who are both large landholders; the defendant holds a putnee talook within the plaintiff's zemindaree; but he has never registered his name in the serishta of the zemindar; and the consequence of this failure on his part, is a feeling of bitterness between landlord and tenant, which has been exhibited in the present suit.

As to the averment of the defendant, that he has repeatedly sent to plaintiff through his servant the whole amount due up to Assar 1266, but that plaintiff refused to take it, we entirely discredit it; it is supported not by the evidence of respectable men to whom the payment of such large sums to the plaintiff would naturally be entrusted, but by the statement of creatures of the defendant, upon whom no reliance can be placed. Moreover, the statements themselves are not such as to command credit, and the plea, we think, is introduced solely with the object of avoiding the charge of interest. There is no contention between the parties before us as to the amount yearly demandable, or as to the amount which has been paid into the collectorate as revenue by the defendant, to a deduction of

which the plaintiff is entitled, the contention is confined simply to the amount remaining due from the defendant.

On examining the accounts before us we find, that the rents of 1261 and 62, which remain in arrear at the end of those years respectively, was collected in 1263, and that the rent of the last year has all been paid. It appears, however, that Rs. 2,366-6-16-1 remain due on account of 1264; Rs. 2,547-7-11-1 on account of 1265; and Rs. 1,502 on account of 1266; the defendant objects to the claim of plaintiff on account of this last year; that he has included in it the sum of Rs. 267-6, which, according to the kistbundee in the kubooleut, are not payable till the month of Ughrun, though his claim is only to Assar. This objection on the part of the defendants, we find on a reference to the kubooleut, to be well founded, and we, therefore, deduct the sum objected to, which leaves Rs. 1,235 as the balance due up to the date included in the present claim; and, moreover, we find, that on the 29th Poos 1266, plaintiff deposited the sum of Rs. 2,300, and on the 14th Maugh a further sum of Rs. 3,839-3-6; upon these two sums from the date of their payment into court, plaintiff is, under section 75, of Act X. of 1859, not entitled to interest. The claim of the defendant to be allowed in the accounts, the 8 annas on which he engrossed his plaint, when depositing the sum of 2,300 on the 29th Poos 1266, we consider to be untenable, if a defendant instead of paying money to the person entitled to it, pays it into court, he must bear any expense which the course of conduct adopted by him, entails upon him.

We, therefore, decree to plaintiff the balance due on account of 1264, 1265, and 1266, with interest from the commencement of the year following that on which the balance accrued up to the date of suit, viz., 28th of Poos, 1266; the consolidated sum of principal and interest due on that date Rs. 2,300, the amount of the deposit made on the 29th Poos must be deducted; on the sum remaining due, interest must be charged at 12 per cent up to the 13th Maugh 1266; a further deduction of Rs. 3,839-3-6 must then be made from the consolidated sum due at the period of the institution of the suit, *minus* the 2,300 previously deducted, and on the sums remaining due after such double deduction, interest at 12 per cent must be charged from the 14th Maugh 1266 up to the date of realization.

The amount of costs was not deposited by defendant, when the sums above noted were deposited by him; Section 74, of Act X. of 1859 will not, therefore, apply to the present case, but the ordinary rule as to costs must be followed, and they must be borne by each party in proportion to the amount decreed and dismissed.

THE 16TH JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Case No. 273 of 1860.

Regular appeal from the decision of Baboo Obhoychurn Bose, Deputy Collector of Baraset, Zillah 24-Pergunnahs, dated the 6th August 1860.

Mussamut Omaruth Debea and others, (Defendants,) *Appellants*,

versus

Brijnath Pal Chowdry and others, (Plaintiffs,) *Respondents*.

Baboo Tarucknath Sein, for appellents.

Baboo Kishenkishore Ghose and *Mr. R. T. Allan*, for respondents.

When a party fails to file with his plaint the cubooleut or other document on which his claim is based, such document cannot be afterwards admitted, unless its absence be sufficiently excused, or the collector, as prescribed in Section 38, Act X. of 1859, allows extension of time. If, however, a case can proceed without the production of such document, its absence will not necessitate a nonsuit or prove a bar to the hearing of the case.

In the present case, though plaintiff had not filed his cubooleut, yet as defendant admitted, that his jumma was originally fixed at the sum mentioned by plaintiff, and pleaded, that subsequently it had been reduced on account

PLAINTIFF sued to recover arrears of rent with interest amounting to Rs. 7,859-2 as. 1*g*. due from 1257 to 1266. The deputy collector gave a decree for the plaintiff, and the defendants have preferred an appeal from that judgment. They admit that they are in possession of the tenures, for the rent of which the suit is brought, viz., the one tenure comprising 700 beegahs in Sheircotty, Suddercotty, Chowhatta, and Banessurcotty, assessed at Rs. 409-3-11, and the other in Mouzah Assicoorah, comprising 200 beegahs, and assessed at Rs. 100; that they received a jungleboory pottah for the first-named tenure in 1230; that subsequently in 1237, the zemindary in which these tenures were situated, was partitioned, and they fell to the share of Eshur Chunder Pal Chowdhry, with the exception of the land in Banessurcotty, comprising 25 beegahs, half of which fell to the share of Eshur Chunder, and the other half to that of Joy Narayan, to whom plaintiff has since paid rent; that of the remaining lands which comprised several gantees, 52*b*. 15*c*. in Sheircotty, 80 beegahs in Suddercotty, and 27*b*. 2*c*. in Chowhatta, total 160 beegahs 9*c*., were resumed by government in 1248 = 1842, and settled with the Rajah of Nuddea; that in 1237, they applied to the zemindar for a deduction of rent on account of 300 beegahs which had been carried away by the Kalinde river, and on 15th Falgoon 1252, they, after local enquiry under instructions from the zemindar had been made, received a pottah from Ram Ruttun Roy, the then naib of Eshur Chunder Pal Chowdhry, in which deductions on account of the above alienations and diluviation were made, and the remaining area comprising 375 beegahs, was assessed at 9 *annas* per beegah, giving a jumma of Rs. 220, which has since been paid, as shewn by the receipts of Ram Ruttun and other naibs of the zemindar; that the lower court, without requiring any evidence from the plaintiff in the shape of a cubooleut or accounts, have, merely on the defendant's statement that his

jumma was once Rs. 409-3-11, and without any proper investigation into the truth of defendant's allegation that this jumma was subsequently reduced to Rs. 225, given a decree for the plaintiff; that before the lower court could look to the defendant's allegation, the plaintiff was bound to produce some evidence in support of his claim, and as he failed to file the cubooleut, upon which that claim is based along with the plaint as required by law, his suit must necessarily be dismissed. The pleader for defendants, appellants, added, that should the Court be against him on this point, he would shew that the dowl received from Ram Ruttun was a genuine document; that Ram Ruttun was naib of the zemindar, and authorised to grant the dowl; and that appellant had paid rents in conformity with its terms; and that the object of this suit was to get rid of a tenure having a fixed jumma.

of resumption and diluviation, and that he had received a fresh dowl from the plaintiff's naib. It was held, that defendant was bound to prove his allegation, and having failed to do so to the satisfaction of the Court, his appeal was dismissed.

The respondents' pleader in answer stated, that though the cubooleut in which the claim was based, had inadvertently not been filed with the plaint, such omission did not necessitate a dismissal of the suit, and as the appellant had in his answer admitted, that his rent was originally fixed at Rs. 409, the rate at which this action was brought, but pleaded a subsequent arrangement with the zemindar's naib, Ram Ruttun, under which deductions on account of diluvion and resumptions were made, and the tenure held by him at a reduced jumma, it was for him to prove this plea, and on his failure to do so, and the payment of rents also alleged to have been made, plaintiff was entitled to recover the full amount of his claim.

JUDGMENT.

The proper course for a party bringing a suit in court, is to file with his plaint, the original document on which his claim is based. The neglect to do so, however, does not necessitate the dismissal of the suit, but the document, if afterwards sought to be put in, cannot be received unless its non-production be sufficiently excused, or the collector see fit to extend the time. In Section 38, Act. X. of 1859, this rule is clearly laid down. If then, as in the present case, the suit can proceed without the production by plaintiff of his principal document, we think, the appellant's first objection to the further progress of the suit to be untenable. In his answer the appellant admits possession of the tenure, for the rent of which this suit is brought. He acknowledges, that the jumma was as stated by the plaintiff, but he pleads, that at a subsequent period this jumma was reduced, and a dowl bearing a lower rent was granted him by the zemindar's naib, and that he has since paid rent accordingly. In support of his statement, that he received a dowl at a reduced jumma from Ram Ruttun, the naib of the zemindar, the appellant, has cited one Ishwur Chunder Biswas, whom he calls his

gomashtah, to give evidence. This witness deposes, that in 1252, he was in attendance on Ram Ruttun at Bussuntpoor, and received from him the dowl filed in this suit. The jumma was fixed a Rs. 415, on account of three mehals, including that for which rent is now demanded. That the rent was adjusted after deductions were made for diluvion and resumption, and that a regular pottah was promised, but that the original cubooleut was not returned to him. He adds, that rent has been regularly paid at the terms of the dowl from 1252 to 1260, and states further, that Ram Ruttun was discharged in 1254, when the zemindar farmed his property. Other witnesses whose evidence has been read to the court are Bolanath Bose, a Nugdee, who on several occasions took the rent to the zemindar's cutcherry. Shib Chunder Chowdhry and Omesh Chunder Mitter, the treasurer, and naib of the zemindar, called by appellant to prove payment of rent and attest the dakhilas. These witnesses, however, depose, that they never received rent nor gave the dakhilas, and Modhoo Shudun Bose, gomashtah for the plaintiff, in mouzahs Sheircotty, &c., who also deposes, that the rent of that tenure is Rs. 409-3-11, and that nothing has been paid by the defendants, appellants, from 1257 to 1266. Even admitting the objection taken by appellant to this last named witness, that he has been recently appointed to the office of gomashtah, and does not speak of things within his own knowledge, yet we think, appellant has failed to make out his case satisfactorily. The evidence of the zemindar's naib and treasurer is entirely aganist the appellant, that of Bolanath Nugdee is of the usual kind, to which no credit ever attaches, and we distrust the evidence of Ishwur Chunder Biswas, who, though he deposes to having brought the dowl filed in this suit from Ram Ruttun, is unable to tell us by whom it was written, nor is the dowl otherwise attested, nor is it shewn us, why Ram Ruttun, the alleged maker of the dowl, has not been summoned to give evidence in this case, nor has it been proved, that Ram Ruttun was the zemindar's naib. Further, we think it very improbable, that appellant would have been satisfied with receiving the dowl, an informal document on plain paper, and not have inquired the return of his old cubooleut. For these reasons, we think there are no sufficient grounds to interfere with the decision of the court below, and dismiss the appeal, with costs.

THE 16TH JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Case No. 343 of 1858.

Regular appeal from the decision of Baboo Gobindchunder Chowdry, Principal Sudder Ameen of Moorshedabad, dated the 17th March 1858.

Musst. Fatima Begum, (one of the Defendants,) *Appellant,*

versus

Mohummud Ally Khan, (Plaintiff,) and others, (Defendants,) *Respondents.*

Baboo Bhoobunmohun Roy and *Moulvie Aftabuddin Mahomed,* for appellant.

Baboo Sumbhoonath Pundit and *Moulvie Lootfur Ruhman,* for respondents.

A. G. K.

Suit laid at Co.'s Rs. 11,101-14-16-14.

Plaintiff suing to establish her right to lands lying on the other side of a navigable river where they had gradually accreted, held, that her right was barred under the provisions of Reg. XI. of 1825.

THE plaint states that Imdad Ally died possessed of certain properties, to which the defendant, Fatima Begum, his widow, and Koolsome Begum, his daughter, succeeded, in the proportions of 2 annas to the widow, and 14 annas to the daughter. The latter died some time after her succession, but the widow, Fatima, refusing to give up to the plaintiff the ½ share of Koolsome, to which he, as her husband, is entitled, he is under the necessity of suing her for it.

Fatima Begum pleads in answer, that Koolsome Begum being a depraved woman, Imdad Ally, her father, disinherited her, and gave his entire property to the defendant by a deed of hibba. The defendant further denies, that Koolsome was ever married to the plaintiff, and avers that he merely kept her as his mistress, in which capacity she had lived previously with other parties.

The principal sudder ameen decreed for the plaintiff, and the defendant has preferred this appeal, supporting it with the same pleas she urged originally.

We quite agree with the principal sudder ameen, that there is no proof at all of any of the allegations which the defendant has advanced in opposition to the claim. On the contrary, we are altogether of the principal sudder ameen's opinion, that there is good and satisfactory evidence to prove, that all the allegations which have been made to resist the claim are false and unfounded.

The marriage of the plaintiff with Koolsome was proved by the kazee who united them, and by other reliable testimony, and the story of the hibba was found to be false in a former suit, in which the defendant was a party, and in which the goodness or otherwise of the deed in question was a material issue.

We accordingly uphold the judgment of the lower court, and dismiss the appeal, with costs.

THE 29TH JANUARY 1861.

H. T. RAIKES, C. B. TREVOR, and G. LOCH, ESQS., Judges,

Case No. 296 of 1858.

Regular appeal from the decision of Baboo Tarakanth Biddyasagur Bhuttacharg, Principal Sudder Ameen of Cuttack, dated the 8th March 1858.

Prandhur Roy *alias* Prandhur Mongraj and others, (Plaintiffs,) *Appellants,*

versus

Ramchunder Mongraj and others, (Defendants,) *Respondents.*

Moulvee Murhummut Hossein, Moulvee Ameer Ally, Baboo Kissensukha Mookerjea, and *Mr. W. J. B. Money,* for appellants.

Baboos Sumbhoonath Pundit, Ramanath Bose, Dwarkanath Mitter, and *Tarrucknath Sein,* for responpents.

Suit laid at Co.'s Rs. 15,694-9-6.

Held, that in killah Hurrishpore the custom of phoolbihaiee does prevail. That in the *killahs* the son of a phoolbihaiee succeeds to the property in preference of the agnates on failure of male issue by a patranee; that the defendant in the present case is the son by phoolbihaiee of the late Chukerbutty Mongraj, killahdar of Hurrishpoor and as such is entitled to succeed to the killah in preference of the plaintiff who claims as the son of Adhikant, uncle of Chuckerbutty.

THIS suit is brought by plaintiff, alleging himself to be the next legal heir to the late Chuckerbutty Mongraj, to obtain possession of certain landed property known as Killah Hurrishpoor, in the possession of the defendant, Ramchunder Mongraj, who claims to hold them as son of the late Chuckerbutty Mongraj by a phoolbihaiee, *i. e.*, a marriage contracted by the ceremony of putting a garland round the neck of the woman or by exchange of garlands. It is contended by the plaintiffs, that Chuckerbutty Mongraj did not make any phoolbihaiee, that defendant is the son of a slave girl, and was never brought up in Chuckerbutty's house, but was declared to be his son after Chuckerbutty's death by Bhugoban Purida, servant of the deceased, in collusion with Chuckerbutty's mother and sister-in-law and his widows, with a view of preventing the inhertance coming to plaintiff, the next legal heir. Plaintiff recites the genealogy through which the poperty has descended from the time of Juggernath Mongraj, the founder of the family, to Neelkant Mongraj, the grand-father of the plaintiff. Neelkant left six sons, of whom Damoodur was the eldest and died childless, Modhooshudun was the second, and succeeded his brother, and from him the line descends to the defendants, plaintiff is the son of Adhikant, the youngest son of Neelkant, and youngest brother of Modhooskudun. Modhooshudun had three sons, Beerkishore, the eldest, and Guddadhur, the youngest, died without issue, the latter leaving a widow, one of the defendants in this case, the second son of Modhooshudun was Chuckerbutty Mongraj, who

succeeded to the property. He married four patranees, and died without male issue, but leaving two daughters by his second patranee, Nissamonee. The defendant alleges that he is the son of Chitrokallah Dabee, with whom Chuckerbutty contracted a phoolbihaiee during the life-time of his first patranee Soorujmonee, and before he had married the other ranees, and as such, claims to succeed to the property in conformity with the custom of the family on failure of male heirs by any of the patranees in preference to the more distant members of the family of the late zemindar. plaintiff declares this claim to be untenable, first, because Chuckerbutty never made a phoolbihaiee; secondly, because the defendant is the son of a slave girl; and thirdly, because the son of a phoolbihaiee does not succeed in preference to the more distant relatives of the deceased proprietor on failure of male issue by a patranee.

In his answer, the defendant objects, first, to Rughonath Dass, one of the plaintiffs who has brought this suit along with Prandhur having purchased a six anna share of the property in dispute from him, on the ground, that this is one of the tributary mehals in Cuttack, and cannot under the law be subdivided; that the other plaintiff, Prandhur, is not what he represents himself to be, the son of Audhikant, sixth son of Neelkant, for there never existed any person of that name; that he is the son of a prostitute by a common labourer, named Chitterah, whose mother subsequent to the death of her paramour was entertained as a servant in Killah Bissenpore; that the Rajah of Killah Bissenpore having an old grudge against defendant's late father, Chuckerbutty Mongraj, and thinking it a good opportunity of satisfying his revenge as well as a means of getting rid of a heavy debt due by him to the said Rughonath Dass, has put forward the plaintiff Prandhur as heir to the Hurrishpoor property, Rughonath helping in the case with money and advice, and securing his interests by a collusive bill of sale of six annas of the property. The defendant then rejects the genealogy given by plaintiff, and states that Joydeb Roy was the founder of the family from whom the property descended through their eldest sons by patranees to Gobind Surun Barber, who had two sons, one Trilochun Barber by his patranee, the other Nursingh by a phoolbihaiee, which he contracted with the daughter of Bhaid Puttah Sing; that Trilochun succeeded his father and dying childless, was succeeded by Nursing, who left issue, Neelkant Mongraj, who succeeded to the property. On his death Modhooshudun succeeded to the property and died, leaving three sons, Beerkishore, Chuckerbutty, and Guddadhur. Beerkishore died childless and was succeeded by Chuckerbutty, during whose minority the property was managed by the Court of Wards. Guddadhur also died without issue, leaving a widow Soorujmonee. Chuckerbutty Mongraj first married his patranee

Soorujmonee, and then contracted a phoolbihaiee with Chitrokallah Dabee, daughter of Chytun Mytee, of Mouzah Hoolash, the mother of the defendant. Chuckerbutty subsequently married three other patranees, Nissamonee, Soomitra Dabee, and Ohelya. By Nissamonee he had a daughter, and on the death of defendant's mother, he was, as he alleges, brought up by Nissamonee. The defendant adds, that Chuckerbutty died on 21st Aughrun 1262 B. S., that previous to his death, he made over on 19th Aughrun, all his property to the defendant, and drew up a petition to the collector, in which he declared defendant to be his son by phoolbihaiee, and entitled to the rajghee. After his death, this petition was transmitted to the collector on 3rd Poos 1262, with letters from Suttobhama, the mother of Chuckerbutty, Soorujmonee, widow of his brother Guddadhur, Nissamonee, and the other two widows, admitting defendant's claims to the property, and submitting a horoscope shewing the defendant to be of age. The collector after deputing his nazir to make an inventory of the property, and having a personal interview with the defendant, decided that he was under age, and put the property under charge of the Court of Wards, Nissamonee being appointed guardian of the minor till 1264, when he came of age. The plaintiff, Prandhur, who had previously protested, but without effect, before the collector and judge, against the recognition of defendant as the legitimate son of Chuckerbutty Mongraj, then brought the present suit, and has by some means obtained the countenance and assistance of Nissamonee and the other two widows of Chuckerbutty Mongraj, who now declare the defendant not to be his son and not entitled to the property. The defendant also further urges, that Prandhur and his mother never received maintenance from Hurrishpoor, for had such been the case, the account of the Court of Wards during the minority of Chuckerbutty, would have exhibited the charge.

The defendant, Nissamonee, widow of Chuckerbutty Mongraj, declares that phoolbihaiees are unknown in the Hurrishpoor family; that the defendant Ramchunder is not the son of Chuckerbutty, but an orphan brought up in the temple; that she was induced to acknowledge him as heir to the property of Chuckerbutty, in order to secure half of it for her daughter, Nal Ruttunmonee; that Prandhur is the real heir to the estates, but that fearing he would not prove conformable to her wishes, she at the suggestion of Bhugoban Purida, her late husband's agent, set up Ramchunder as her husband's son by a phoolbihaiee, and gave a blank sheet of stamp paper, bearing her signature to the said agent to file a petition before the collector, and she does not know what was written; that she received an ikrar from Ramchunder making over half the property to her as the price of his installation on the guddee, which

property she subsequently made over to her daughter on her marriage; that Ramchunder was then of age, but the collector brought the property under the Court of Wards, and appointed her as guardian, but has now ordered the whole to be delivered to the said Ramchunder.

The defendant, Suttobhama, mother of the deceased, Chuckerbutty Mongraj, supports the statement of the defendant Ramchunder; acknowledges him as her grand-son, and after giving the genealogical tree in which Nursing, the son of a phoolbihaiee, is said to have succeeded on the death of his half brother Trilochun; she adds, that these phoolbihaiees do take place in the family, and that where the male issue by the patranees fails, the son by a phoolbihaiee succeeds to the rajghee.

The principal sudder ameen, after disposing of the pleas in bar to the hearing of the suit, proceeds to decide the issues on the merits. He first determines the question as to the parentage of the plaintiff, and holds it to be satisfactorily proved, that he is the son of Adhikant, sixth son of Neelkant Mongraj, and against this finding no appeal has been preferred. He then goes into the fact of the defendant's parentage and finds him to be the son of the late Chuckerbutty Mongraj by his phoolbihaiee wife Chitrokallah Dabee; and he considers the statements now made by the defendant Nissamonee, and the other two widows of Chuckerbutty Mongraj in contradiction to the statements made by them immediately after the death of their husband, and of their affirmation before the collector's nazir, of the petition purporting to have been written by Chuckerbutty's order, a few days before his death, for presentation to the collector, to be the result of collusion. Having determined these points, and found both the principal defendants to be connected with the Hurrishpoor family, he next disposes of the main issue, to whom will the property by right of inheritance devolve. In deciding this point, the principal sudder ameen, besides recording a mass of oral evidence, has referred to certain questions put by the Commissioner of Cuttack in 1814, to the proprietors of certain principal killahs and ghurs in the tributary mehals, relative to their usages and customs regarding marriage, inheritance, and other subjects, and known generally as the "puchees sowal." The answers given by the various rajahs were embodied in two statements drawn up by the commissioner, and copy of that containing the replies of the killahdars was filed in this suit by the defendant, and the principal sudder ameen sent for an authenticated copy of the other statement containing the answers given by the ghur rajahs from the commissioner's office. The killahdars and the ghurdars held different opinions as to the right of a son by phoolbihaiee to succeed to the rajghee in preference to the collateral heirs of the deceased; and as the killahdar of Hurrishpoor had not been

consulted in 1814, his name not appearing in the commissioner's statement, the principal sudder ameen in conformity with a precedent of the Sudder Court in the case of Killah Parikood, dated 20th May 1840, took evidence to ascertain what were the particular customs in regard to the succession or otherwise of sons by phoolbihaiee, which appertained in the family of Hurrishpoor, to be gathered from the practice in the families of other rajahs sprung from the same stock. From the statement of 1814, he found that the rajah of Koojungh intermarried with the familes of Hurrishpoor, Murrichpoor, and Bishtopoor; and as the 7th answer given by the killahdars shewed, that marriages in their families were contracted among those of the same caste, he concluded that the Hurrishpoor and Koojungh were of the same caste. He further ascertanied from the evidence of the rajah of Bishtopoor, who is of the same stock as the rajah of Hurrishpoor, that the rajah of Kunka was of the same caste, and it was a fact contradicted by neither party that Suttobhama, mother of the late Chuckerbutty, was daughter of the raja of Koojungh. He further ascertained, that none of the rajahs of the ghurs were connected with the Hurrishpoor, Murrichpoor, and Bishtopoor families, for though the rajah of Bishtopoor had in his evidence stated, that a relationship existed between his family and that of the rajah of ghur Runpoor, such relationship is not admitted by the rajah of Runpoor in the statement of 1814.

As to the fact of phoolbihaiee being customary in the family, the principal sudder ameen referred to a decision of the zillah court of 25th April 1825, in which Ram Guzamunt brought a suit to obtain possession of the rajghee of Murrichpoor, which is of the same stock as Hurrishpoor against Bullobhudro Mongraj, on the allegation that he plaintiff was the son of the late raja by phoolbihaiee. No question as to the prevalence of such marriages was raised by the defendant in that case, who pleaded, that plaintiff was the son of a barber. In another decision of the zillah court, dated 22nd June 1821, in which Bullobhudro sued for possession of the rajghee of Murrichpore, a decree was given him in conformity with the opinions of the killahdars, recorded in the statement of 1814, so that statement which has never been impugned since it was drawn up in 1814, must be looked upon as authority in deciding all questions of succession in the killahs. Now all the killahdars consulted on that occasion, admitted the existence of the custom of phoolbihaiee, and therefore, the statements made many years after, by the Rajah of Sukindah and others in the Parikood case, can be of no weight, nor indeed any statement made in the present day, if opposed to the statements made in 1814; and further, a decision of the Commissioner of Cuttack of 30th June 1820, shewed that the son of a phoolbihaiee

succeeded to the rajghee of Kunka, and the present occupant of that Raj is also the offspring of a similar marriage, and that as the Raja of Koojungh, as admitted by him in his evidence taken in another case in 1844, is a Khutree, as are the disputants in the present case; the principal sudder ameen held, that the question of succession should be determined by the custom in vogue in the families of the Rajahs of Kunka and Koojungh; and considering the petition bearing the seal and signature of Chuckerbutty Mongraj, transmitted to the collector by his widows and mother after his death, to be authentic, as well as the horoscope then also produced, he considered the defendant entitled, under the family custom prevalent in the killahs, to succeed in preference to the plaintiff whose suit he dismissed with costs.

An appeal has been preferred from this decision by the plaintiff. His counsel urges, that in 1814, certain questions were propounded by the Commissioner of Cuttack to the Rajahs of nine killahs and of eighteen ghurs in the tributary mehals relative to their family customs as regards succession and other usages. In some points, the answers of the killahdars and ghurdars agreed, in others they were diametrically opposed. Among the questions asked were two, relating to the succession of a son by a phoolbihaiee, a marriage contracted with a woman of inferior rank, but of respectable family, and recognised in some families in preference to the agnates and of a son by a slave girl. On the first point, the killahdars and gurhdars are at variance, the former holding that on failure of issue by the patranees, the son by a phoolbihaiee will succeed in preference to the agnates; the latter holding the contrary opinion. Both killahdars and gurhdars are agreed on the second point, that the son of a slave girl has no right to succession in preference to the agnates. But Killah Hurrishpoor, it is urged, for which the present litigation is going on, is not comprised either among the killahs or ghurs consulted in 1814, and therefore is not bound by any rule or custom prevalent among them. Plaintiff is the nearest agnate of the deceased Chuckerbutty Mongraj, and seeks to recover possession from the defendant, who alleges himself to be the offspring of a phoolbihaiee in an ordinary zemindary; and plaintiff further alleges the defendant to be the son of a slave girl and not the son of the late Chuckerbutty, so that defendant must prove not only that he is the legitimate son of Chuckerbutty but also that the family was one in which the phoolbihaiee prevailed, and that the son by such marriage succeeded in preference to the agnates.

The Court at this stage of the proceedings intimated to the counsel for the appellants, that it might tend to shorten the discussion, if the question of the right of a son by phoolbihaiee to

succession in preference to the agnates was first argued, and that if the Court were against him on that point, he could then proceed to the other question of legitimacy.

The counsel for the appellants then proceeded to remark on the decision passed by the lower court on this point. The principal sudder ameen held, that according to the customs of the killahs, the son by a flower marriage (phoolbihaiee) took precedence of the agnate relations ; that though the families of Hurrishpoor, Murrichpoor, and Bishtopoor are not among the killahs consulted in 1814, yet the killahdar of Koojungh, who was questioned on that occasion, says, that his family intermarried with the families of Hurrishpoor and Murrichpore, and he concludes, therefore, that the customs which prevail in Koojungh must necessarily prevail in Hurrishpoor and Murrichpoor. This reasoning is illogical, for some of the killahdars state that they intermarry with the ghurs, and all the ghurdars consulted in 1814 declare, that the son of a phoolbihaiee does not take precedence of the agnates. The heads of the Murrichpoor and Bishtopoor branches of this family have been examined in this trial, and both state that Chuckerbutty contracted no phoolbihaiee, and could not have done so, because such marriages do not take place in their family. No objection can be taken to this evidence, which may be considered as contrary to interest. The same statement is made by the rajahs of Killah Golra and Burtoongee, who, though not of the same family, are of the same caste. There are also the kyfeuts called for by the lower court under instructions from the Sudder in the Parikood case in 1841, from the rajahs of Sukindah, Modhoopoor, Rampoor and other killahs, all which prove the agnates to be preferred to the son by the phoolbihaiee. The decision in that case quite meets the principal sudder ameen's reasoning, for he argues, that the disputants in the present case being Khutrees, must have the same customs as prevail in the killah of Koojungh, the rajah of which is also a Khutree, but the statements made by the rajahs embodied in that decision, shew that Khutrees even reject the phoolbihaiee son.

In reply it was urged, that the attempt made by the opposite party to shew, that the property in dispute is an ordinary zemindary, and not affected by the customs of the other killahs, is contrary to the pleadings. If it were an ordinary zemindary, neither of the litigants could succeed during the life-time of the daughters of Nissamonee, who, on the failure of male issue by any of the married wives, would undoubtedly succeed to their father Chuckerbutty's estate. But it is evident, that Hurrishpoor is one of the tributary mehals paying a peshcush to government, and as such it is acknowledged on all hands that the daughters have no right to succeed. Both parties admit that in 1814, the Commissioner of Cuttack called

upon the principal killahdars and ghurdars for a statement of their customs, and these statements have been referred to, to assist in determining the succession to the killah in dispute, and it was shewn, that the families of some of the killahs mentioned in those statements intermarried with the families of Hurrishpoor and Murrichpoor, which proves not only the connection of these families to each other, but with reference to the question put, that they came of the same stock, and were therefore likely to have the same customs. But the lower court finding that Hurrishpoor was not mentioned in the above returns, followed the course prescribed by this court in the Parikood case, and took evidence to the special custom, which might pertain in this killah. Kyfeuts were called for in that case from certain killahdars, who denied the existence of the phoolbihaiee custom in their families, but little weight can be attached to their statements, for among them the killahdars of Sukindah and Modhoopoor in 1814, admitted the prevalence of the custom. That phoolbihaiees do take place in the Hurrishpoor family, may be proved indirectly from what occurred in Murrichpoor in 1825, when Ram Guzamunt brought a suit against Bullobhudro Mongraj for the possession of that killah, claiming to be the son of the late rajah by phoolbihaiee. The existence of such marriages was not denied in that case, nor the right of the son by such a marriage to succeed, but defendant pleaded that plaintiff was the son of a barber; and as plaintiff failed to prove his parentage, his suit was dismissed. A decision of the commissioner of the 30th June 1820, in the case of killah Kunka, which is admitted by the Rajah of Bishtopoor in his evidence, to be of the same stock, shews that the custom of phoolbihaiee prevailed in that family and the authority of the "puchees sowal" statements drawn up in 1814, cannot now be disputed by plaintiff as not binding on his family, as, from a decree of the zillah court of 22nd June 1821, it is evident that Bullobhudro Mongraj got possession of the Murrichpoor Raj on the strength of those statements as containing the usages and customs prevalent in the killahs under which succession was ruled.

JUDGMENT.

The question as brought before us in appeal has taken a wider range than set forth in the plaint. The plaint does not distinctly deny the existence of phoolbihaiee in the family, but denies that Chuckerbutty ever contracted such a marriage, and then goes on to contend, that according to the customs prevalent in Hurrishpoor, the son of a phoolbihaiee cannot succeed in preference to the agnates. The existence of the custom of phoolbihaiee is, however, distinctly denied by the defendant, Nissamoneee, who in her answer now supports the claims of the plaintiff. As to its existence in the family, we have, besides the direct testimony of several witnesses,

the decisions of the zillah courts in 1825, in the case of Killah Murrichpoor, and the answers given by all the killahdars consulted in 1814, and embodied in the commissioner's statement, the authority of which was never impugned till 1841, when this Court by order of a single judge in the Parikood case, directed kyfeuts to be called for from other killahdars. Up to that time, it appears to us, this statement was received as a record of the customs and usages prevalent in all the killahs; and the existence of the phoolbihaiee in all the killahs is admitted as an established custom. It is evident also, that the phoolbihaiee prevails also among the ghurs, but the position of the son by a phoolbihaiee in the latter, is different as regards succession from what it is in the former. In the killahs, the phoolbihaiee son on failure of male issue by the patranees, is preferred to the agnates, whereas in the ghurs it is just the contrary. The killahs and ghurs are essentially the same. All are tributary mehals, and "Sterling," in his account of Orissa, says, that all were originally known by the Hindee name of "ghur," the Mahomedans calling them "killahs," both words however having the same signification. Under the British rule, to judge from the heading of the two statements of 1814, all tributary mehals in which the regulations of government are in force are called killahs, while those in which the regulations have not effect, retain their original name of ghurs. This difference of name, however, is insufficient to account for the difference existing in the killahs and ghurs on a point of so much importance as the right to succession of the son of a phoolbihaiee; and neither party is able to offer any explanation of the cause. It has been urged for the appellant, that Hurrishpoor is neither a killah nor a ghur within the meaning of those words as applied to the rajahs, to whom the (puchees sowal) twenty-five questions were addressed in 1814, but an ordinary zemindary, that consequently it is not subject to customs prevalent in those killahs and ghurs, but has customs of its own, and in determining which, the statements of 1814 cannot be received as any authority; that the rajahs of Murrichpoor and Bishtopoor, who are of the same stock, and in whose families the same customs prevail as in Hurrishpoor, have distinctly deposed to the non-existence of phoolbihaiee, either in their own or the Hurrishpoor family, and their evidence is supported by that of other rajahs and respectable people, who have given testimony to the same effect, as well as by the proceedings which took place in the Parikood case. We have no doubt that Hurrishpoor is a killah similar to other killahs, and not a common zemindary, otherwise the present contention in the life-time of the daughters of Chuckerbutty by his patranee Nissamonee could not have arisen. It is a tributary

mehal, and is mentioned as such with Murrichpoor, Bishtopoor, and other similar mehals in Regulation XII. of 1805. Nor do we think the plaintiff is in a position to dispute the authority of the statements of 1814, for it is shewn us in the decision of the zillah court of 22nd June 1821, that Bullobhudro Mongraj succeeded in his suit for possession of the Murrichpoor Raj, on the strength of these very statements to which he referred in support of his claim. Further, we find, on reference to the decision of the zillah court on 25th April 1825, in the case of Ram Guzamunt *versus* Bullobhudro Mongraj, for the Murrichpoor Killah, that this very question of the right of a phoolbihaiee son was agitated. Plaintiff in that case, as son by a phoolbihaiee, claimed the property. The fact of phoolbihaiee being a custom in the family was not denied. It was never disputed, but accepted as a well known custom, and the defendant merely pleaded that the claimant was not the son of the late Rajah by a phoolbihaiee, but the son of a barber and a stranger, and therefore incapable of succeeding. And as from the decision of the commissioner of 30th June 1820, we further find, that in the Koojungh family, which is admittedly of the same caste and stock as Hurrishpoor, the custom of phoolbihaiee prevails, and a son by phoolbihaiee actually succeeded to the property, we are disposed to place no credit in in the evidence of the Rajas of Murrichpoor and Bishtopoor, and the other witnesses who have deposed to the non-existence of this custom in the family, nor do we think any weight is due to the statements filed by the killahdars in the Parikood case, for two of them, the Rajahs of Sukindah and Modhoopoor, made statements entirely opposed to those made by their ancestors in 1814, and the other rajahs consulted on that occasion were the rajahs of the *ghurs* of Mohrbunge, &c., whose ancestors were consulted in 1814, and who then expressed their opinion against the right of a son by a phoolbihaiee. Rejecting, therefore, the evidence of the appellant as unworthy of credit, we think, from the oral evidence adduced by the respondent, and the decisions quoted above, and from the fact which may be gathered from the answers both of the killahdars and ghurdars in 1814, of the universal prevalence of the custom that the marriage known as phoolbihaiee does take place in Hurrishpoor as in other killahs.

On the question of the right to succession of a son by a phoolbihaiee, we find that the killahdars consulted in 1814 held, that such a son, on failure of male issue by a patranee would succeed in preference to the agnates, while the ghurdars held, that such a son would not succeed in the ghurs. We are unable to discover, as observed above, how or when this difference in the

custom of the killahs and ghurs arose, nor do we perceive upon what grounds the commissioner addressed his questions to a few of the killahdars and ghurdars instead of to them all. It is possible that the parties so consulted were at the time the most influential, and the others were led in their usages and customs by their example, or it may be, that the questions were addressed to all, but only a few made any return. But whatever may have been the cause, it is evident, that these answers were embodied in a statement by the commissioner in 1814, which served as a record of the customs and usages prevalent in the killahs and ghurs of the district, and was apparently accepted as of great authority in disposing of all questions in dispute in the tributary mehals from that period till 1840, and though, in a suit for succession to the Parikood Killah, the presiding judge of this Court, who tried the case, did not admit that statement as conclusive proof of the existence of the custom pleaded, because Parikood was not one of the killahs consulted in 1814, and directed further evidence to be taken of any special customs prevailing in that killah, a precedent followed by the principal sudder ameen in trying this case, yet, unless very strong evidence to the contrary be given by the appellant, we should not consider ourselves justified in rejecting the authority of that document now of such antiquity, which lays down the rule for the succession of the son by a phoolbihaiee in preference to the agnates as of universal adoption in the killahs, and as being then an old and well known custom. It may also be observed, that the Parikood case forms no precedent for the disposal of the present suit, for the question before the court in that case was different from that before us. In the Parikood case, the claimant, as half brother by a phoolbihaiee of the father of the deceased minor rajah, sought to succeed to the estate on the death of his alleged nephew, in preference to the distant male relatives of the deceased, and the court held, that such claim was inadmissible. As the appellant has failed to give us any reliable evidence, that in Killah Hurrishpoor the rights of a son by a phoolbihaiee are different from those enjoyed by him in the killahs consulted in 1814, we consider that in this case the son by a phoolbihaiee is entitled to succeed on failure of male issue by a patranee, in preference to the agnates.

On the question as to the parentage of the defendant, we think it unnecessary to record the arguments advanced by the pleaders of either side, consisting chiefly of remarks on the credit to be given to the evidence of the witnesses brought forward by the parties. On the whole, we think the evidence of the witnesses for the defendant more trustworthy than that of the witnesses on the other side, for it is the evidence of men who were in a position

to know, what did take place in the family, and their narration is free from exaggeration, and their statements bear every appearance of probability. Further, we find their evidence supported by the allegation of Suttobhama, mother of Chuckerbutty and of Soorujmonee, widow of his brother Gungadhur; and it is improbable, that these ladies, without any adequate motive, should, from the first, have lent themselves to the deception and permitted the child of a low caste stranger to be received into their family, and should have consistently persisted in the same story. Again, the allegation now made by Nissamonee and the other widows of Chuckerbutty, that the defendant is a stranger and was received into the family at the instigation of Bhugoban Purida on his agreeing to divide the property with the daughter of Nissamonee and giving an ikrar to that effect, is most improbable, for it is evident that previous to the death of Chuckerbutty, there was no design to alter the line of succession or to practise any deception, and we can scarcely suppose that during the short time which elapsed between the death of Chuckerbutty and the announcement made to the collector by his mother, sister-in-law, and three widows, a cheat, so notorious and so disgraceful to the family with apparently no benefit to any of its members but Nissamonee, should have been planned and perfected, and agreed to by all members of the family, the more particularly, when it is considered, that the arrangement alleged to have been entered into between the defendant and Nissamonee for the benefit of her daughter, could not have been sustained for a moment, daughters being excluded from succession by the male relatives of whatever degree, and the estates themselves being declared by law indivisible. We think it much more probable, that immediately after the death of Chuckerbutty, all the members of the family considered it incumbent on them to carry out the known wishes and intention of the deceased, and in this spirit, made their representations to the collector, and forwarded the petition bearing the seal and signature of the deceased, knowing that defendant was his son by phoolbihaiee, and as such, entitled under the family usage prevalent in all killahs to succeed to the guddee on failure of male issue by a patranee, that lapse of time and other influences working on their minds have lessened their regard for the deceased, and having other interests to serve or other objects in view, the widows of Chuckerbutty have been induced to repudiate their former admissions in favor of the defendant, and to join the plaintiff in his endeavour to supplant the defendant. Holding it therefore, to be proved, that the defendant is the son of Chuckerbutty Mongraj by his phoolbihaiee wife, Chitrokallah Dabee, that the phoolbihaiee is customary in Killah Hurrishpoor, as in other killahs and ghurs, and that the son

of such a marriage on failure of heirs male, by a patranee, does succeed to the Rajghee, according to the customs in force in the killahs, in preference to the agnates. We consider the decision of the lower court dismissing the suit, to be correct, and we dismiss this appeal with costs.

THE 31ST JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Regular appeals from the decision of Moulvie Nazirooddeen Khan Bahadoor, Principal Sudder Ameen of Dacca, dated 8th March 1858.

Case No. 354 of 1858.

Kishen Pershaud Surma *alias* Raja Baboo, (Defendant,) *Appellant,*

versus

Kooroonamoyee Dabea and others, (Plaintiffs,) *Respondents.*

Baboos Sumbhoonauth Pundit, and *Poorun Chunder Roy*, for appellant.

Baboos Ramapersaud Roy and *Kishenkishore Ghose*, for respondents.

As. P. C.

Suit laid at Co.'s Rs. 18,418-13-7-1

Case No. 355 of 1858.

Kishen Pershaud Surma, (Defendant,) *Appellant,*

versus

Sham Chand Bysack, (Plaintiff,) *Respondent.*

Baboos Sumbhoonauth Pundit and *Poorun Chunder Roy*, and *Moonshee Ameer Ali*, for appellant.

Baboos Ramapersaud Roy, Kishenkishore Ghose, and *Baney Madhub Banerjea*, for respondent.

Suit laid at Co.'s Rs. 35,838-3-8

Held, that under the provisions of clause 1, section 4, Regulation XI. 1825, the plaintiff had no right to cross a flowing unfordable stream and claim lands which had accreted to the opposite bank by the gradual recession of the river, unless he could prove, there was any local custom

THESE two cases were remanded for local investigation by orders of this Court on 28th August 1856, (page 741,) and an application for a review of judgment was rejected on 21st February 1857, (page 247). The suit was for the possession of certain lands situated in two churs, called respectively Goay and Bhedur, which have gradually accreted to the north bank of the Dulliserry. Plaintiffs claim these churs as being the reformation on their original site of the villages Goay and Bhedur, appertaining to their permanently settled estate Meer Nowab Jan, situated on the south of the river Dulliserry. The defendant claims it as the reformation of his lakhiraj village Booktbullee, situated on the north bank of the Dulliserry to which these lands have accreted. In the year 1839, the heirs of Meer Nowab Jan brought an action under Regulation XV. 1824, to recover possession of chur Goay, of which

they alleged themselves to have been deprived by the owner of Booktbullee, and obtained a decree which was confirmed in appeal. They at the same time stated that they had also been dispossessed of chur Bhedur in 1238, and that they intended to bring an action in the civil court for its recovery. The allegation of the present plaintiffs is, that the defendants, alarmed by this threat, came to an amicable arrangement with their predecessors, and put them in peaceful possession of chur Bhedur. The defendants, however, in 1242, complained to the commissioner that the heirs of Meer Nowab Jan had, under colour of the Magistrate's decision in the Regulation XV. case obtained possession through the darogah of a portion of his Booktbullee lands which they called chur Bhedur. The commissioner after inspecting a map prepared by Mr. Doucett, an indigo planter, directed that the lands which plaintiffs had got possession of as chur Bhedur in collusion with the police should be restored to the defendants, and in compliance with this order the darogah made over all the land to the defendants, except six droons, which continued in the possession of the heirs of Nowab Jan. Resumption proceedings were subsequently instituted on the part of government, which terminated in the release of the churs except a small portion, situated on the south-west.

entitling him to act contrary to the law. That as he had not pleaded such custom, and had failed to prove his allegation that he had at one time been put in peaceful possession of these lands by the defendant, the suit was dismissed.

Plaintiffs' suits were originally dismissed on the ground of limitation by the principal sudder ameen in 1850. They were remanded on appeal in 1852 for the principal sudder ameen, to shew distinctly how the law of limitation applied. For reasons assigned, the principal sudder ameen upheld his former decision on 28th June 1853, and again dismissed the suits. On appeal it was held by this Court, on 28th August 1856, that the suits were not barred by limitation, and the cases were remanded for trial on their merit, the principal sudder ameen being directed to have an accurate and trustworthy map of the localities prepared, to measure the disputed lands, and to reconcile, as far as possible, any discrepancies which may appear between the map prepared by his orders and those already filed. In compliance with these instructions, the principal sudder ameen deputed the moonsiff of Naraingunge to make the local investigation. That officer prepared a map of the disputed churs, marking on it the "gang" referred to in Doucett's map, where the darogah erected a bamboo, when he gave possession to plaintiff's predecessors of the lands of Booktbullee, as alleged by defendants, under cover of the decree passed by the magistrate above alluded to; and he came to the conclusion from the evidence before him that plaintiffs were in possession of the land from the flowing Dulliserry on the south, to the said gang on the north, but that the remainder of the chur was in the defendant's possession, and appertained to his village of Booktbullee. The principal sudder ameen did not

accept the conclusion arrived at by the moonsiff, and for reasons assigned in his proceedings of 8th March 1858 set aside the local investigation made by the moonsiff, and gave plaintiffs a decree for the whole of the disputed lands, as a reformation on their original site of the villages Goay and Bhedur, appertaining to their permanently settled estate Nowab Jan.

An appeal has been preferred by the defendant, who urges that under the provisions of Regulation XI. of 1825, the plaintiff can have no right to these lands, that whatever the resumption courts may have decided, plaintiff is not entitled to come across the flowing river and claim lands which have gradually accreted to the opposite bank; that the law was clearly laid down in the decision of this Court on 14th January last, in the case of Nufeeza Khatoon *versus* Mr. G. P. Wise, and unless plaintiff can prove his allegation that defendant voluntarily delivered up possession of these lands to him, which the Court, when the case was before it on a former occasion, considered not to be satisfactorily proved, and of which he has now admitted by his pleaders in the lower court, that he has no trustworthy evidence, he cannot obtain a decree for these lands as appertaining to his permanently settled estate situated on the south bank of the Dulliserry.

In reply it is urged that the original villages of Goay and Bhedur were situated formerly on the site now occupied by the churs in dispute, that the river then flowed to the north of these villages, but by gradual diluvion destroyed them, and in the course of a few years, from 1224 to 1228, took a more southerly course, leaving the contested churs in the position of the old villages which appertained to plaintiff's permanently settled estate; that while he, the pleader for respondents, admits the correctness of the decision come to by the court on 14th January last, that decision can be of no avail to the appellant, as he admits that mouzah Booktbullee, to which he avers in his pleadings that these churs are an accretion, is not in existence, but itself forms part of the disputed chur; while on the other hand, he, plaintiff, holds a decree of a competent court under Regulation XV. of 1824, which has not been questioned to the present time, and has now become final and conclusive, which awards him possession of certain lands within the disputed churs, as appertaining to his village of Goay, and this being undeniable, he is entitled to claim the adjoining chur lands as accretions to that village.

JUDGMENT.

From the pleadings and maps in this case, we find that formerly the Dulliserry flowed in a course considerably to the north of its present course, that plaintiffs' permanently settled villages of Goay and

Bhedur were situated on the southern bank of that river, while the defendant's village of Buktbullee was on the north bank. The Dullisserry by gradual encroachment from 1224 to 1228, as stated by plaintiffs, on the southern bank, destroyed the two villages of Goay and Bhedur, and receding from the north bank took its present course. By the gradual recession of the river from the north bank, churs were formed attached to the main land on that side, and it is contended by the plaintiff, that as these churs have formed on the site of his original villages Goay and Bhedur, which gradually diluviated, he is entitled to come across the flowing Dullisserry, an unfordable stream, and claim them as appertaining to those villages. He admits that there has been no sudden irruption of the river separating these lands from the original estate, nor any marks by which they can be identified as having at any time formed part of that estate. It is laid down in Clause 1, Section 4, Regulation XI. of 1825, that where land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed. Now as plaintiff does not plead a sudden change in the course of the river, separating these lands from the original estate without destroying their identity, for which class of cases provision is made in Clause 2, of the above Section of the law quoted, it is not a good or valid plea for him to urge, that the defendant cannot claim these lands as an accretion, because his village is not in existence. Whether it be so or not, the Court must first look to plaintiff's claim, and it is for him to establish his right, by some local custom or usage having the force of law which he has not pleaded, or by the alleged arrangement with defendant, appellant, to cross the flowing stream and follow these lands to the opposite bank contrary to the provisions of Regulation XI. of 1825. He is unable to show us that there is any such local custom, nor can he prove the arrangement alleged to have taken place between him and the defendants, under which, as he alleges, he got quiet possession of these chur lands. But he urges, that being in possession of part of the chur as mouzah Goay under a decree of a competent court, which has become final, the rest of the chur lands must be considered an increment to that village. Now it is apparent from the moonsiff's map, that the land for which plaintiff got a decree under Regulation XV. 1824, lies to the south-east corner of the chur, and is bounded by the flowing river on the south. Had the lands now claimed by plaintiff formed to the southward of that portion of the chur decreed to him, they might, as justly and ably remarked by Baboo Sumbhoonath Pundit for the appellant, have been considered as an increment to his village, but as it is admitted, that the Dulliserry formerly flowed to the north of the original villages of chur Bhedur and Goay, and gra-

dually diluviated these villages, which were on its southern bank, while it left an accretion on its northern bank, it is self-evident that all the land lying to the northward of the decreed lands, and between them and the main land to the north, must have accreted long before the portion decreed to plaintiffs came into existence, and therefore, cannot be considered an increment to plaintiff's decreed land, which, properly speaking, is an increment to it. There can, we think, be no doubt as to the correctness of this reasoning, and we consider the plea taken by the plaintiffs, respondant's pleader, that the disputed chur lands are an increment to his decreed land as altogether invalid. As therefore the plaintiffs have failed to plead or prove the existence of any custom or usage having the force of law which entitles them, contrary to the provisions of Regulation XI. of 1825, to cross the flowing river and claim lands which have accreted on the opposite bank, and as any orders passed by the Resumption Courts, releasing or resuming the chur lands can give plaintiff no right or title which, he had not by law, and as he is unable to offer any satisfactory proof of the arrangement under which he alleges that he obtained peaceable possession, we think the plaintiffs' claim to the lands in dispute must, under the provisions of Clause 1, Section 4, Regulation XI. 1825, be considered untenable, and therefore, reversing the decision of the lower court, we give a decree for the defendants, appellants, and dismiss plaintiffs' suit with all costs.

THE 31ST JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Regular appeals from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated the 19th January 1858.

Case No. 346 of 1858.

Mrs. Z. H. Lee, (Defendant,) *Appellant.*

versus

Mrs. Sophy Foley, (Plaintiff,) *Respondent,*

Baboo Sumbhoonath Pundit, for appellant.

Mr. R. T. Allan and *Baboo Ramapersaud Roy,* for respondent.

Case No. 347 of 1858.

Mrs. Annie Kalonas, wife and representative of Mr. Nicholas Kalonas, insane, and mother and guardian of her daughter, Annie Kalonas and her son, A. N. Kalonas, minors, (Defendant,) *Appellant.*

versus

Mrs. Sophy Foley, (Plaintiff,) *Respondent.*

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for appellant.

Mr. R. T. Allan and *Baboo Ramapersaud Roy,* for respondent.

Suit laid at Co's. Rs. 9,245-11-3-5.

THIS is a suit instituted by one of the daughters of the late Marinoos Nicholas Kalonas, against Mrs. Despeno Kalonas, Mrs. Annie Kalonas, Mrs Lee, and others, for possession by right of inheritance with mesne profits, from the date of his death, of a four anna share of the estate left by her late father, and for the cancelment of a deed of a sale and of an under-tenure, which has been fraudulently executed in favor of one of the defendants.

The plaintiff alleges, that her late father married twice; that by the first marriage he had two sons, Nicholas and Demetrius, and by the second marriage with the defendant, Mrs. Despeno Kalonas, he had two daughters, herself and Margaret. That her father died on the 26th April 1840, intestate, that at his death she and her sister Margaret were minors, and her step-brother, Demetrius, insane. That Mrs. Despeno Kalonas and her step-son, Nicholas, who was then sane, disputed as to the management of the estate; that the matter was referred to arbitrators. That on the 12th September 1840, an arbitration award was made, by which the management of the estate was to remain in the hands of Nicholas and Mrs. Despeno Kalonas, and until a clear exposition of the Greek Law, current at the date of the death of Marinoos Nicholas Kalonas, should be obtained, the profits of the estate were to be appropriated in the following proportions.

Held that under the Greek Law current in 1840, when a person leaves as many as three children and a widow, the latter takes a fourth of the property if it does not exceed 100 pound weight of gold, the remaining ¾ being divided equally amongst the children; and the payment of the deceased's debt being first provided for; if, however, he leaves more than three children and a widow, they all take equally, but in this case, the widow has only the usu-

fruct of her share the ownership of which is in her children by her deceased husband; if the surviving children are not hers, but by another marriage of her husband, she takes her share absolutely.

Held also, that when a compromise is in the nature of a temporary family arrangement, entered into, in consequence of doubt and uncertainty regarding the right of the different parties to it, on the arrangement being superseded by a decree of court clearing up the uncertainties, the court will not interfere with the arrangement, but limit its action to the period during which the suit was pending before the court.

	a.	g.	c.	k.
To Mrs. Despeno Kalonas, ...	3	4	0	0
To Nicholas Kalonas, ...	5	6	2	2
To Demetrius Kalonas, ...	3	4	0	0
To the plaintiff and her sister Margaret in equal shares	4	5	1	1

by which award, if the plaintiff and her sister at the time of marriage, voluntarily gave up their title in their father's estate, they, so relinquishing their claim, were to receive 1,000 Rs. from Nicholas Kalonas, and by which, moreover, all parties were prohibited from alienating any portion of the estate during the pendency of the question of the extent and nature of their rights according to the Greek Law. That according to this arbitration award, Mrs. Despeno Kalonas and Nicholas Kalonas managed the estate until the latter became insane, when his wife, Mrs. Annie Kalonas, defendant, for herself and as guardian of her minor children, was substituted in his room as co-manager with Mrs. Despeno Kalonas. That by the Greek Law the four children of Marinops Nicholas Kalonas are entitled to equal shares of the property left by their father, that is, to 4 annas each. That her sister Margaret, on her marriage with Mr. Ricketts, of Burrisal, relinquished all claim to her father's estate for a consideration of 4,000 Rs., for which sum Mrs. Annie Kalonas, as representative of Nicholas Kalonas, gave her a bond, and on Margaret dying childless in Jyte 1255, plaintiff by the Greek Law succeeded to her estate, and sued Mrs. Annie Kalonas for the amount of the bond executed by her in favor of her sister, and obtained a decree on the 9th March 1850; that on her reaching her 18th year, she, plaintiff, contracted a marriage with Mr. William Foley, and claimed, but ineffectually, her share in the estate of her father. That the defendants have consequently forced her into court, and as she was a minor at the time of the arbitration award, and was no party to it, she therefore brings her present action.

The defendant, Mrs. Annie Kalonas, in her answer pleads that as her husband, Nicholas, was the eldest son of Marinoos Nicholas Kalonas, he is under the Greek Law sole heir to his father's estate, and plaintiff has no right whatever, either to the estate or to the mesne profits arising from it. That under the arbitration award, the defendant Despeno Kalonas was in sole management of estate, and that she, if any one, is liable for the mesne profits to the plaintiff. The defendant Mrs. Despeno Kalonas filed no answer, but on the 27th July 1857, she filed a petition stating that she had been prevented putting in an appearance earlier and more formally by ignorance of what her title was under the Greek Law, but she had since discovered, that the book filed by the plaintiff supplied the information, and that the extent of her title is fixed in para-

graph 81, page 443 of the said book. That the plaintiff's title is to a 3*a*.-4*g*. in the estate of her father, but not to a 4 anna share.

The defendant, Mrs. Lee, pleads, that the lakhiraj land and Ousut Talook in her possession are legally hers by sale and purchase from the defendants, Despeno Kalonas and Annie Kalonas.

The other defendants file no answer.

On the issue as to the share to which the plaintiff is entitled under the Greek Law, the judge observes as follows: "The principal parties to this suit are of the Greek persuasion. It is admitted that Marinoos Nicholas Kalonas died intestate, it is also admitted, that he left two sons by his first marriage, and two daughters by his second marriage, and that his second wife suryived him. These parties are all represented in the suit. The plaintiff in support of her claim to inherit one fourth of her father's estate, files an extract from a book published at Athens in 1855. This book is said to contain the Greek Law; it is clear, that it was acknowledged to be such by the reigning power at the above period, for I find from the first article of the King's manifesto, published at the commencement of the volume, that Otho, King of Greece, in a manifesto dated Athens, 23rd February 1835, formally recognized this book as the Greek Law, until such time as a code could be prepared. Plaintiff bases her claim to ¼ of her father's estate on the following passage: 'The things that have been left behind by the parent are divided equally, if he willed them not; but if he made a disposition, each of them receives according to the proportion the father projected; but what they have either in marriage portion or in other gift preceding marriage, they join together in contributing if their remaining brothers and sisters have not, so much as the share established by law from their common parent, for then those who have compensate those who have not, an equal share from what they have from without.' The principal defendant, Mrs. Annie Kalonas, urges, that the book filed by the plaintiff is not Greek Law, and that by that law, her husband, Nicholas Kalonas, is the sole heir to the estate of his father, but she has not filed an exposition of the Greek Law supporting her averment, and that this book has been accepted as an authority by our Courts in disputes arising between parties of the Greek persuasion, is manifest from a copy of the dicision of the additional judge of Dacca, dated 11th February 1852. As to the allegation of the defendant, Mrs. Despeno Kalonas, that she, the widow of Marinoos Kalonas, is entitled to a share, after a careful consideration of the section quoted by her, I find that there were more than three children left at the death of Marinoos Nicholas Kalonas by his two marriages, and that by Section 81, his widow is entitled to no share, and it is

Para. 29, page 430.

"quite unnecessary to determine in this suit what her title, if any, "may be. The court has only to decide whether by Greek Law, the "plaintiff is entitled to a 4 anna share in the estate of her late "father, and this it does in the affirmative."

The alleged sale of lakhiraj land to the defendant, Mrs. Lee, the judge set aside as fictitious and fraudulent. "The subscribing witnesses to the deed," he remarks, "are Aluck Chunder "Sen, Eshan Chunder Dass, Sheik Muddon, and Habioolah. Aluck "Chunder deposes, that he is a mooktear by profession, he admits that he wrote the deed, but states, that the sale was a benami one to avoid the claims of creditors. Eshan Chunder Doss and "Habioolah depose to the sale, to the execution of the deed, and "receipt of the consideration, and the possession of Mrs. Lee. I "am of opinion, however, that this is a fictitious conveyance, and "that Mrs. Lee has never held *bonâ fide* possession of the lands "for the following reasons. It is admitted, that the land, which "is very small in area, is occupied by the zemindaree cutcherries, "the land is situated in the town of Burrisal, and it is quite impossible to believe that the defendants, Mrs. Despeno and Annie "Kalonas, who have, from time to time, since the death of the "late Marinoos Nicholas Kalonas, managed the estate, should "convey outright for the paltry consideration of 60 Rs. their "zemindaree cutcherry, with the land on which it stands, to Mrs. "Lee. Mrs. Despeno in her evidence deposes, that the lakhiraj land "was purchased from the funds of the estate, and not from her "private funds. Again, I find in the deed of conveyance, mention is "made of the transfer to the alleged vendee, Mrs. Lee, of the "former title deeds received from Mr. Paul, these have not been "filed by Mrs. Lee, and her vakeel was unable to produce them "though called on by the court so to do. It is very clear, that "the sale was a fictitious one, had it been *bonâ fide* the former "title deeds and chittahs alluded to in the deed would have been "made over to the vendee, Mrs. Lee." The judge pronounced the Ousut Talook also, the title deeds of which have not been produced, said to have been created in her favor, to be fictitious talooks, put forth to defraud creditors.

The judge, therefore, gave plaintiff a decree for possession of a 4 anna share of the estate of her late father, with mesne profits from the date of his decease, viz. 26th April 1840. The amount of mesne profits to be ascertained in the usual way by local enquiry, and to bear interest from the date on which the amount may be ascertained and fixed, and he declared the plaintiff's title in no way prejudiced by the fictitious sale and under-tenure set up by the defendant, Mrs. Lee, which he sets aside. For the costs of the plaintiff, the defendants, Mrs. Despeno and Annie

Kalonas, were declared liable, and the other defendants were to pay their own costs.

From the decision of the judge three appeals were preferred to this Court, one by Mrs. Despeno Kalonas, one by Mrs. Annie Kalonas, and another by Mrs. Lee. The appeal of the first named party has been withdrawn, so the Court has now to deal only with the appeals of Mrs. Annie Kalonas and Mrs. Lee.

We proceed to notice first the appeal of Mrs. Annie Kalonas. She objects to the finding of the judge as to the share of her father's estate to which the plaintiff is entitled; that it is based upon a book which is no authority, and which has not been proved to contain Greek Law, as it existed prior to and at the period of the demise of the ancestor of both parties, Marinoos Nicholas Kalonas. That according to that law, her husband, the eldest son of the deceased, is the sole heir to her father-in-law, and that the decision of the judge, consequently, should be reversed, and the plaintiff's claim should be dismissed. That even if plaintiff is entitled to the share which the judge has given her, she is not entitled to mesne profits for a period anterior to the suit.

At the time of the death of Marinoos Nicholas Kalonas, the ancestor of the parties before the Court, two sons were living, the issue of his first wife, and two daughters, the issue of his second; his second wife also survived him; the question raised by the different pleadings is, whether according to the Greek Law in force at the period of the decease of Marinoos Nicholas, viz., 26th April 1840, the children succeed equally to the exclusion of the widow, or, whether the children and widow take equal shares, or, whether the law of primogeniture prevails under the Greek Law.

For the purpose of enabling the Court to answer the question which has been put before them, the plaintiff has filed a book of Greek Law printed at Athens in 1835, and as remarked by the judge, in the order of Council at the commencement of it, it is ordained that the civil law of the Byzantine emperors, which are contained in the six books, shall remain in force until the publication of the civil code, the preparation of which has been determined.

Now seeing that the order in Council was dated in 1835, and that Marinoos Nicholas Kalonas died in April 1840, it is a fair presumption, as not a tittle of evidence to the contrary has been produced by the defendants, that the law, as contained in the book, which was sanctioned in the former year continued in force up to the latter date.

Moreover, it will be shewn below, that its contents, so far as they refer to the point before the Court, are identical with the Novels of Justinian. Now it is well known, that all the original compilations of Justinian in Latin were, under the Greek emperors, translated, and bore the title of Basilica. "The publication of an authorized body

of law in the Greek language led, it has been observed, to the disuse of the original compilations of Justinian in the east; but the Roman law was the more firmly established in Eastern Europe and Western Asia, where it has maintained itself amongst the Greek population to the present day." Based then on this identity, we have a strong ground for accepting the book as containing the Greek Law at the period at which the ancestor of the parties before the Court died, viz., in 1840.

Looking then at it in this light, we observe, that had Marinoos Nicholas Kalonas only left four children, two sons by his first wife, and two daughters by his second, we should have been quite prepared to decide the case in accordance with the passage cited by the judge. By it, the children, sons and daughters, succeed equally to the property of the parent, and in this point the book agrees with the 118th Novel of Justinian, by which, without any distinction in respect, either of their sex or their priority of birth, the children equally participate in the property of either parent.

But in the present case we have not only four children, but the widow surviving the deceased, and the point before us cannot be determined by a reference to the passage cited by the judge. For its determination, we must turn to the passage referred to by the defendant below, Mrs. Despeno Nicholas Kalonas, as occurring in page 443, para. 81. When translated so far as is necessary for the present purpose of the Court, it stands thus, "if any one (wealthy) should marry a poor wife and predecease her, then if the husband of the woman has up to three children either by her or by another marriage, she takes a fourth share of the husband's property, his debts being first deducted from his wealth, provided that her share does not exceed 100 lbs. weight of gold. If there are more children than three, we decree that the wife is to take an equal share with the children; but she is only to have the use of the same, and the ownership is preserved for the children of that marriage; but if this wife has no children of that marriage, we decree that she shall possess a right of ownership to that which comes to her from the property of her husband."

Now we find this rule to be exactly similar with those laid down in the 53rd and 117th Novels of Justinian, that is, in the latest civil law, as given in the 4th volume of Burge's Commentaries on Colonial and Foreign law, pages 45 to 50. By these laws, if the husband has died wealthy and the wife poor and unendowed, then if the husband had left only three children, whether by her or by any previous marriage, she is allowed to take a fourth, which in no case could exceed 100 pounds weight of gold; but if there are more than three children, she takes an equal share with the children; if any of the children were her own, she takes only the usufruct of her share, and, on her death, the principal reverts to her children;

if the children were not hers, but those of the husband by a former wife, she takes an absolute property in her share.

We do not find, that either the Greek or Roman law has expressed the amount of property in respect of which the husband was to be deemed wealthy, and the wife indigent. "It was left," as remarked by the learned author above cited, "to the discretion of the judge to decide what was the condition of the deceased and of the survivor". Looking, however, to the evidence before us in this case, we are clearly of opinion, that Marinoos Nicholas Kalonas may be considered to have died wealthy, and to have left his widow, Mrs. Despeno Kalonas, undowered and poor; it follows, that she is under the Greek Law above cited, entitled to the usufruct of a fifth share of the property left by her husband, which, on her death, reverts in equal shares to the plaintiff, and the representatives or assignees of the rights of her daughter, Margaret, the children of Mrs. Despeno Kalonas, by her husband, Marinoos Nicholas Kalonas. Such being the state of the case, the share of her father's property to which the possession of the plaintiff is at present entitled is a 3a. 4g. share, and not a 4a. share as decreed to her by the judge under a mistaken interpretation of Section 81, which we have given above, and she has a vested interest in a half share of the one-fifth share to the possession of which she will be entitled on the death of her mother, Mrs. Despeno Kalonas.

The next point we have to determine is, the date from which the plaintiff should receive mesne profits from the defendant, appellant, and also from Mrs. Despeno Kalonas. The award of the arbitrators given after the death of Marinoos Nicholas Kalonas, was in the nature of a temporary compromise of conflicting and doubtful claims entered into in good faith between the different parties, and regarding it, in that light alone, we should be inclined to give it every effect; but in the present instance the compromise partakes also of the nature of a temporary family arrangement, and as such, is a transaction to which it is the policy of the law administered in this country, as it is that of every other system of jurisprudence to give the greatest efficacy. The plaintiff in the present case in no way impeaches the acts of her natural guardian, her mother, in connection with the compromise as having been done not in good faith and with dishonest motives. This being the case, notwithstanding that the rights of the plaintiff have now been determined to be of greater extent than they were allowed to be under the temporary compromise, the Court would not be warranted in interfering with the compromise by awarding mesne profits during its continuance. The very essence and motive of that compromise was the uncertainty and doubt which the parties had as to their respective rights; that doubt arose from the ignorance of all the parties concerned of the Greek Law, and the removal of that ignorance subsequently, and the

ascertainment of rights contrary to it, can form no ground for vitiating the arrangement made under the compromise, for the period during which it lasted.

Under this view of the case we think, that the plaintiff is only entitled to mesne profits from the date of the institution of the present suit. Of course, if the plaintiff considers, that any thing is due under the arbitration to her from the managers in possession, she is at liberty to sue them for an account, and nothing which the Court has said in the present case, can in any way interfere with the prosecution of such a claim.

We turn now to the appeal of Mrs. Lee, she objects to the finding of the judge that it is altogether opposed to the evidence on the record, but after attentively considering that finding and the evidence on which it was based, we entirely agree with the view which the judge has taken of the appellant's claim; we consider for the reasons stated by the judge, that the sale of kheragee lakheraj land was a fictitious conveyance, and that the Ousut talooks were creations of the same nature, both put forth to defraud creditors.

We, therefore, on the appeal of Mrs. Annie Kalonas, modify the decisions of the judge, and decree to the plaintiff a 3a. 4g. share of the estate left by her late father, Marinoos Nicholas Kalonas, with mesne profits from both the defendants, Mrs. Despeno and Annie Kalonas, from the date of the institution of the suit to the date of realization, with costs in proportion to the amount decreed and dismissed, and we dismiss the appeal of Mrs. Lee with costs.

THE 31ST JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Regular appeals from the decision of Mr. L. S. Jackson, Acting Judge of Rajshahye, dated the 30th April 1858.

Case No. 356 of 1858.

Chunder Dhur Roy and others, (Plaintiffs,) *Appellants,*

versus

Hursoonder Moitro and others, (Defendants,) *Respondents.*

Baboos Baneymadhub Banerjee, Bungshee Buddun Mitter, and *Ramapersaud Roy,* and *Kishenkishore Ghose,* for appellants.

Mr. R. T. Allan and *Baboos Sumbhoonath Pundit, Tarucknath Sein* and *Ramanath Bose,* for respondents.

Case No. 409 of 1858.

Gridhur Roy and others, (Plaintiffs,) *Appellants,*

versus

Hursoonder Moitro and others, (Defendants,) *Respondents.*

Baboo Chundernath Chatterjee, for appellants.

Suit laid at Co.'s Rs. 7,558-13-10.

Where plaintiffs failed to give full and satisfactory proof of their rights to the lands claimed, the appeal was dismissed.

PLAINTIFFS, as proprietors of the adjoining villages, Talooka Sessunia, Khoolashakhally, and Tollut, seek to recover possession of 42 kadahs, 1 paki, 5 kanees and 36½ beegahs of the former, and 3 kadahs, 12 pakies, and 5 kanees of the latter village from the defendants, on the allegation that the defendants have ousted them, claiming the lands as belonging to their talook Pindarhatty.

Defendants claim the part of the disputed lands lying to the northward, as appertaining to the village of Sessunia, and that to the southward as appertaining to Pindarhatty.

Two suits were originally instituted, one No. 21 of 1848 in appeal before us, which was tried by the principal sudder ameen, the other No. 43 of 1850, by the defendant, claiming the land to the southward as Pindarhatty, which was tried by the sudder ameen. Ultimately both cases were remanded by this Court to be tried together (see page 889 of the reports of 1853, and page 906 of ditto of 1856,) and the judge himself proceeded to the spot and caused a map of the disputed lands to be prepared by an ameen, who scientifically surveyed them, and laid down the disputed boundaries. The boundary pointed out by the plaintiff ran from the Esamutty river on the north, along the western boundary of Tollut and Pindarhatty, and the edge of the Pindarhatty tank, and from thence in a crooked line to the Katyadoha bheel on the south. The boundary pointed out by the defendants was considerably to

the westward, and through the centre of Mouzah Sessunia. It commenced from the Esamutty river on the north, followed the course of a crooked path or halut to the Bholagharee bheel, which it skirted on the east, and then following a crooked ayl along the eastern boundary of Mouzah Guzrakhallee fell into the Katyadoha bheel. The judge, after duly considering the evidence adduced by the parties, and the depositions of persons resident on or near the disputed lands, recorded by his orders, held, that the boundary as pointed out by the defendants was the true eastern boundary of the plaintiff's talook Sessunia, and that they (plaintiffs) had a right to no lands to the eastward of that line, and he, therefore, dismissed their suit. He also dismissed the suit of the defendants on the ground that he had virtually decided it in the other case, that having determined what was the eastern boundary of plaintiffs' talook Sessunia, across which they could not pass, it was unnecessary for him to pronounce whether the lands claimed by the defendants in their suit appertained to Pindarhatty or Sessunia, of both of which they were proprietors.

Plaintiff, in case 21 of 1848, dissatisfied with the decision of the judge, have appealed. The defendants, plaintiffs, in case 43 of 1850, have acquiesced in his judgment regarding their suit.

It appears that disputes have been going on between the present parties for many years; that so far back as 1814, a suit was instituted by defendants for the possession of 18 kadahs, 2 pakies, and 13 kanees in Khoolashakhally Bholagharee, which they claimed as Pindarhatty, and which suit was dismissed by the first court, and the order confirmed in appeal in 1819. Subsequently other disputes arose, and on 9th February 1846, the magistrate in an award, under Act IV. 1840, directed plaintiffs to be retained in possession of the lands within certain boundaries thus described. On the east an ayl; on the south Katyadoha bheel; on the south-west and west Guzrakhallee; on the north Bholagharee and Khoolashakhally dohur, to the north of which is situated Sessunia Khoolashakhally. This order was confirmed in appeal and possession was given on 29th Assar 1253, 12th July 1846, to the plaintiffs, as shewn by their receipt. On 29th Cheyt 1253, 10th April 1847, a petition was presented by the Messrs. Watson, lessees, on the part of the defendants to the magistrate, alleging that the mohurer had collusively given possession of their lands to the plaintiffs. The magistrate on 25th April, ordered an enquiry to be made, but on appeal to the session judge this order was reversed on 27th May following, and the parties were referred to the civil court. On the 15th July 1847, plaintiff filed another petition to the judge, and that officer for some reason then directed them to institute another suit under Act IV. 1840, and the magistrate, after making a local investigation,

directed on 6th November 1847, that the defendants, lessees, be kept in possession of the land to the east of the ayl running from the dry nulla, which appears in the judge's map on the east of the Bholagharee bheel, and under cover of this order the defendants, it is alleged, have taken possession of the lands now in dispute, claiming them as their Pindarhatty and Sessunia lands; and the present suit to set aside that order, and to recover possession, was filed on 17th February 1848.

It is admitted by plaintiffs that the defendants have a right to lands in Mouzah Sessunia, but they aver that these lands lie to the eastward of the boundary line pointed out by them, as laid down on the judge's map, and that they are mixed up with the Pindarhatty lands. In support of this assertion they have offered no proof; and in support of their own claim to the lands now in possession of the defendants they have produced certain witnesses, whom they allege to be the descendants of the ryots of Sessunia, who were driven from their homesteads situated to the south-east of the disputed lands by the violence of the defendants, and have now established themselves in the present village of that name. They also produce their own chittahs of these lands of 1248 and 1250; the decision of the civil court, dated 19th July 1819; the orders of the resumption officer of 21st April 1846, under which certain chur lands were declared liable to assessment, and the subsequent order of the Special Commissioner of 15th September 1847, releasing 36½ beegahs on the appeal of the plaintiffs; copy of the kyfeut filed by the defendant, Hurosoonder, on 26th May 1845, in the Act IV. case, first decided by the magistrate, in which he admitted that he had been ejected from all his lands in Mouzah Sessunia, and that this dispossession had been confirmed by a decision of the civil court, viz., that of 1819, and consequently it is urged, that at this late period he cannot assert any right to the lands of Sessunia. It is also urged, that the petition of Messrs. Watson to the magistrate in 1847, shews that plaintiffs were put in possession of the lands up to the ayl on the east as far as the Pindarhatty tank; that they were irregularly ejected by the subsequent proceedings of the magisterial authorities; that the award of 9th February 1845, being passed by a competent court, entitles them to be kept in possession till the other party can prove a better title to the land.

JUDGMENT.

On consideration of the evidence put before us by the plaintiffs, we think it insufficient to establish their right to the lands now claimed. The decision of 1819 does not determine the site of the lands in dispute in that case, one chief object of which appears to have been to set aside certain summary decisions for rent; nor has any trustworthy evidence been adduced to fix the position of these

lands as identical with any portion of the area now in dispute. It may be admitted that plaintiffs were put in possession of certain lands forming part of those now in dispute under the magistrate's order of the 9th February 1845, but such an award conveyed no title, and that possession was set aside by a subsequent award of an equally competent court, and plaintiffs being now out of possession under that later award, must satisfactorily prove their right to the lands now claimed. Stress has been laid upon a statement made by the defendants in a kyfeut filed by him in the Act IV. case decided by the magistrate in February 1845, in which he stated that he had under a decision of the civil court been deprived of his rights in Talook Sessunia, and it is alleged that defendant there alludes to the decision of 1819. On referring to that decision we find, that the claim related to about 14 kadahs in Pindarhatty, and about 3 kadahs in Mouzah Sessunia, and even admitting the words quoted from the kyfeut to bear the meaning put upon them by the plaintiff's pleader, yet defendant is not estopped by any such statement from claiming the lands as appertaining to his village Sessunia, nor is plaintiff exonerated thereby from proving fully his title to these lands. Again, the resumption proceeding of the special Commissioner of 15th September 1847, gives plaintiffs no title, It is true that 36½ beegahs, forming part of a much larger area which was declared liable to assessment by the deputy collector, were released by the special Commissioner on the appeal of the plaintiffs, but that order left the question of title undetermined, and plaintiff must shew his right and title to these lands before this Court could pass an order evicting the party in possession. As plaintiffs, however, have failed to adduce any satisfactory evidence of their right to any of the lands in dispute, we dismiss this appeal with costs. A similar order is applicable to appeal No. 409.

SUMMARY CASES.

JANUARY.

1861.

THE 12TH JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Summary order on a regular appeal from the decision of the Collector of Behar, dated 13th December 1860.

Ranee Summund Koowar, *Petitioner*,

versus

Sheikh Hurmuth Ally, *Opposite Party*.

Baboo Ramapersaud Roy and *Mr. R. T. Allan*, for petitioner.

THIS is an appeal from the order of the collector of Behar, dated 13th December 1860.

It is unnecessary to enter into all the circumstances of the case; it will suffice to remark, that the plaintiff before the collector applied under Section 25, Act X. of 1859, for assistance to eject an agent, who, after the determination of his agency by the exercise on her part of the power of dismissal which remained with her, continued to hold over. The collector proceeded to enquire into the case, and passed an order rejecting the plaintiff's application.

The plaintiff now appeals to this court against the order of the collector, and it has been urged on her behalf, that inasmuch as the yearly salary of the agent, the value of the estate, and the amount of the collections from them yearly, amounts to more than 5000, this court, under Section 160, of Act X. of 1859, has jurisdiction over it.

The words of the Section are as follows. "In all suits other "than those in which, when tried and decided by a collector, "the judgment of the collector is declared to be final, or when "tried and decided by a deputy collector, an appeal is allowed "to the collector, an appeal shall lie to the zillah judge unless "the *amount or value* in dispute exceed 5,000 Rs., in which case "the appeal shall lie to the Sudder Court."

Now in the case before us, there is no amount or value in dispute at all. The assistance of the collector is simply required to enable the plaintiff to exercise a legal right: looking therefore to the words of the Section cited, we are clearly of opinion, that in the matter before us, an appeal does not lie to this court, and that the fact of the salary of, or the amount to be collected yearly by the agent, or the value of the property of which the agent had the management being above 5,000 Rs., are insufficient to give this court jurisdiction, and that in order to enable the court to exercise the jurisdiction given to it by the Act, the amount or value directly in dispute between the parties

Held, that a appeal from a order of th collector r jecting an a plication mad under Sectio 25, Act X. 1859, for a sistance t eject an agen after the d termination his agenc whatever ma be the exte of his agenc will not lie this Cour That in ord to give th court jurisdi tion th amount or v lue directly dispute in suit betwe the partie must exce five thousa rupees.

must exceed 5,000 Rs., and that the court's jurisdiction is limited by the law to this class of cases.

Under this view of the law, the plaintiff must appeal to the zillah judge, and this court cannot interfere, as however, under Section 37, of Act X. of 1859, the statement of the plaintiff in an application like the present is only required to be written on paper bearing a stamp of the value of 8 annas, it follows that in appeal a stamp covering an ordinary miscellaneous petition is sufficient. The appeal in the present instance has been filed on a stamp paper of the value of 350 Rs., this sum, minus 2 Rs. the value of a stamp for a miscellaneous petition, will therefore be returned to the petitioner.

THE 22ND JANUARY 1861.

H. T. RAIKES, C. B. TREVOR, and G. LOCH, Esqs., Judges.

Case No. 360 of 1860.

Summary appeal from the decision of Mr. L. J. Jackson, Judge of Midnapore, dated 20th August 1860.

Tareenee Churn Mookerjee and others, (Appellants,) *Petitioners,*

versus

Juggut Chunder Mookerjee and others, (Respondents,) *Opposite Party.*

Baboos Ramapersaud Roy and *Unookoolchunder Mookerjee,* for petitioners.

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for opposite party.

The Court refused to stay execution of a lower Court's decree under Section 338 of the procedure Act, as no special reasons were pleaded for staying execution. The judge below having rejected execution to proceed after the decree under had furnished security in conformity with the provision of Section 339.

IN this case an order has been passed under Section 339 of Act VIII. of 1859, by the judge of Midnapore, directing the decreeholder in the suit to give in security prior to taking out execution of his decree, and the application here is to stay execution altogether under Section 338 of the Act, on the ground that an appeal has been filed in this Court from the judgment passed below.

In the first place, the vakeel for the applicant wished to enter upon the merits of the judgment passed below, with the view of showing us, that the decision was erroneous, but we considered that any discussion of this nature was out of place at this stage of the proceedings, and the Court did not, therefore, think it necessary to take up the question upon that ground, moreover, the judgment has evidently been passed after a full and deliberate consideration of the merits, and bears no appearance of haste or want of care, it is not, therefore, upon any ground of manifest error or incompleteness in the judgment itself, that there is any reason for staying execution on the terms proposed by the lower court.

Neither does it appear to us, that the fact of the decree being for land, and that some confusion may follow the change of owners should the decree of the lower court not stand in appeal, afford sufficient grounds for staying execution. No extraordinary cause for interference has been pleaded, and did the court, simply upon the ground that the decree involved real property, consent to stay execution in this case, a similar order would be reasonably expected in all such cases, and a general principle of action would be introduced leading to the very inconvenience which Regulation XIII. of 1808 was intended to suppress.

Unless then very special reasons can be shewn for staying execution in suits for lands and houses, we think, the rule should continue to be as under the old law, and to allow execution to proceed.

In the present case, no special reasons whatever having been made apparent, we reject the application with costs.

THE 23RD JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ., Officiating Judge.

Case No. 264 of 1860.

Summary appeal from the decision of Baboo Punchanund Banerjea, Principal Sudder Ameen of Rajshahye, dated the 2nd March 1860.

Rajah Annundnath Roy, *Petitioner*,

versus

Shamasoonderee Dassea, and others, *Opposite Party*.

Baboos Sreenath Dass and *Sumbhoonath Pundit*, for petitioner.

Baboos Kishenkishore Ghose, Baneymadhub Banerjea, and *Gopal Lall Mitter*, for opposite party.

Held, that in a suit in which the pleadings had been filed, the issues drawn and the parties were present with their witnesses previous to the enactment of Act VIII. of 1859, it was not competent to the principal sudder ameen under Section 29, Act VIII. of 1859, to reject the plaint, and that to such a case the law cited is altogether inapplicable.

THE plaintiff, appellant, sued, previously to the passing of Act VIII. 1859, for possession of certain lands. The defendant appeared, and the proceeding under Section 10 of Regulation 26 of 1814, was drawn up previously to that date. Subsequently, however, to the passing of the Act, the principal sudder ameen took up the case, and inasmuch as the plaint and a map filed by the plaintiff did not entirely agree as to the position of land with reference to the point of the compass, he rejected the plaint under Section 29 of Act VIII. of 1859.

From that order a summary appeal has now been preferred to this Court by the plaintiffs below, they urge, that the new law was quite inapplicable to their case, and that consequently they have a right to appeal summarily against an order which has placed them in a position in which they ought not to have been placed.

We think that the principal sudder ameen was quite wrong in applying Section 29, Act VIII. of 1859, to the declaration of a suit filed

Case remanded for investigation on its merits.

under the old law of procedure, of a suit, moreover in which the pleadings had been filed, issues fixed, and the parties were present with their witnesses. That Section is quite inapplicable to a suit filed under the old procedure, and a summary appeal from an order of this nature will lie. We, therefore, reverse the order of the principal sudder ameen, and direct the principal sudder ameen to decide the plaintiff's case on its merits, looking to the record as it stands.

THE 31st JANUARY 1861.

C. B. TREVOR and G. LOCH, ESQS., Judges, and C. STEER, ESQ, Officiating Judge.

Case No. 61 of 1861.

Benodelol Mytee and others, *Petitioners*,

versus

Ramdhun Ghose, *Opposite Party*.

Baboo Poornoo Chunder Roy, for petitioner.

Held, that under the provisions of Act XLIII. of 1860, the admission of a special appeal depend on the nature of the suit and not on the decision come to by the court, and that if the court have given plaintiff more than he asked for, the course for defendants is to apply for review of judgment, pointing out to the court the error with which it had fallen.

THIS suit, as far as can be gathered from the abstract of the plaint in the decision of the lower court, was to recover damages from defendants for preventing the plaintiff cultivating certain lands in his possession. The amount of damages claimed was under Rs. 100. The principal sudder ameen on appeal gave a decree for the amount of damages and directed that plaintiff's possession should be confirmed, defendant filed a special appeal, which the deputy register, under the provisions of Act XLIII. 1860, refused to admit, and as it appeared from the petition that the plaintiff had laid claim to possession as well as for damages, a reference has been made to a full bench whether such special appeal can be admitted.

As stated above, the plaint only seeks a certain amount of damages, but the principal sudder ameen has apparently gone beyond the plaint, and ordered the plaintiff to be confirmed in possession. Such an order, which, as far as we can judge from the papers before us, is beyond the prayer of the plaint, will not render a special appeal admissible, for that must be determined by the *nature* of the suit and not by the *decision come to*. Petitioner is unable to shew us that the plaintiff sought any further relief than recovery of the value of crops, and therefore, we consider the special appeal is not admissible under the provisions of Act XLIII. of 1860. If the lower court have gone beyond the prayer of the plaint, and has given plaintiff more than he asked for, the petitioner should apply to the lower court for review, pointing out the error which may have been committed. Petition rejected.

THE 11TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Regular appeals from the decision of Mr. E. F. Eautour, Additional Judge of Behar, dated the 7th April 1860.

Case No. 184 of 1860.

Omrao Singh and another, (Defendants,) *Appellants,*

versus

Fuqueera Khan and others, (Plaintiffs,) *Respondents.*

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for appellants.

Baboo Kishensukha Mookerjee and *Moulvy Murhumut Hossein,* for respondents.

Suit laid at Co.'s Rs. 2,913-5.

Case No. 186 of 1860.

Omrao Singh and another, (Defendants,) *Appellants,*

versus

Fuqueera Khan and another, (Plaintiffs,) and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for appellants.

Mr. R. T. Allan and *Moulvy Murhumut Hossein,* for respondents.

Suit laid at Co.'s Rs. 4,110-10.

Case No. 187 of 1860.

Omrao Singh and another, (Defendants,) *Appellants,*

versus

Mussamut Husseena and others, (Plaintiffs,) and Mussamut Bebee Doolaree and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for appellants.

Suit laid at Co.'s Rs. 357-4-7-4-2.

Case No. 194 of 1860.

Omrao Singh and another, (Plaintiffs,) *Appellants.*

versus

Bebee Bhopoorun and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose, Ramapersaud Roy, Sumbhoonath Pundit, and *Moonshee Ameer Ally,* for appellants.

Baboo Kishensukha Mookerjee and *Moulvee Aftabuddeen Mohamed,* for respondents.

Suit laid at Co.'s Rs. 5,569-5-6.

Held, that limitation is a bar to the action, as plaintiff has not proved posses-

IN the first three appeals the suits were originally instituted by persons representing themselves to be the heirs, or those deriving title from the heirs of Raja Golam Allee Khan, and the property in suit consists of 70 beegahs of land in Russoolpore, 4 beegahs, 4

sion within 12 years of the institution of the suit.

biswas of land in Hunsrajpore, and 10 biswas of Nyapookur. The averment of their complaint is, that the property in suit devolved upon them as the heirs of Golam Allee Khan, and that they held possession of it until 1843 A. D., when the common defendant, Omrao Sing, disputed with them for the ripe crops and got a suit before the Criminal Authorities under Act. IV. of 1840, which terminated in their dispossession under the orders of the magistrate, which orders they now seek to set aside, and to recover possession of the lands in question.

The defence set up is the same in all these three cases, namely, that the whole of the property left by Golam Allee Khan, came into the possession of his widow, Bhuttun, in discharge of the dower due to her, and that Bhuttun, in the year 1836, sold to Omrao Singh's father for good and full consideration, the property now sued for, and delivered over to him possession of the same. That this property had continued in the family possession ever since, and any suit now made for its recovery was barred by limitation. That the Act IV. case referred to was not the means by which Omrao Singh acquired his possession, but was a suit which arose from disputes fomented by the plaintiffs, but in which the magistrate maintained the defendant's possession, and therefore can be no fresh limitation for the plaintiffs.

The fourth case was instituted by Omrao Singh, to establish his title on the ground of a bill of sale executed by Bhuttun in favor of his predecessor, and of an ikrar alleged to have been executed by the heirs of Golam Allee Khan, on the occasion of a decreejaree sale, under color of which some of his heirs in an action brought against other heirs for their share in Golam Allee's estate, attempted to possess themselves of the 4 beegahs, 4 biswas of land in Hunsrajpore, and being opposed by Omrao Sing, they gave a written acknowledgment of his rights, and also added thereto an acknowledgment of the validity of his father's purchase of the lands in Russoolpore and Nyapookur, and Omrao Sing now pleaded, that by this document the heirs were concluded from disputing his rights in the lands in question.

In this suit the heirs and their representatives denied the bill of sale and the ikrar, and pleaded their right of inheritance.

In the zillah court, the judge first took up Omrao Singh's complaint and enquired into the validity of the ikrarnamah above described, and holding that no such deed had been executed, and consequently that the heirs had never bound themselves to admit the transfer of the property in suit, dismissed Omrao Singh's action with costs. Upon the finding thus come to by the judge in this suit of Omrao Singh, the judge has decreed the claims of the plaintiffs in the other three suits. He holds, that Bhuttun

having been sued for restitution of the property of her husband, Golam Allee, and a decree passed against her, she was not competent *after* that decree to convey to Omrao Singh's predecessor any land held by her from her husband, and that, therefore, the bill of sale set up by Omrao, could give him no title; and as the ikrar had been found to be spurious, the plaintiffs in the three suits were entitled to get. the land claimed by them.

The appellant, therefore, in all these four cases is Omrao Sing, and the first point urged for him is the limitation point, which it is pleaded has been entirely overlooked by the judge below, as no reasons whatever have been recorded by the judge for passing over the point and deciding the case without reference to the applicability of the law or otherwise.

We have therefore to consider, whether limitation does or does not act as a bar to any action at the present time by the heirs of Golam Allee Khan, or those deriving title from them for the recovery of this property.

From the arguments adduced, we were at first inclined to think that Bhuttun's sale as a widow in possession might be regarded as a sale by a trustee only, and of no valid effect against those who might be regarded as the parties for whom the trust was held, but on lookmg into the pleadings and the facts averred in the plaints, we find that no question is raised on the part of the heir as to the position of Bhuttun after her husband's death, or her inability to dispose of the property for want of title in herself. The plaintiffs merely aver that the property was in their possession when the Act IV. case came on, and that they were dispossessed under its authority in 1843; that the defendant then for the first time alleged the acquirement of the property under a kawala whose genuineness they denied.

We also find, that when the other heirs of Golam Allee brought a suit for their shares in the inheritance against Bhuttun, and procured a decree for property as then detailed, no mention is made of the lands in Russoolpore or Nyapookur, only the 4 beegahs, 4 biswas of land in Hunsrajpore, and no explanation is given to us to account for the omission of the other lands as forming part of the estate of Golam Allee Khan.

Under these circumstances it seems to us, that as Omrao Singh is admittedly in possession of the lands now sued for, and the averment of the plaint is, that he got possession only in 1843, under the Act IV. proceedings and not under the kawala set up by them; that as those proceedings show *primâ facie*, that Omrao Singh was the party then actually in possession, and that in that ground he was maintained by competent courts in possession, it is incumbent upon the plaintiffs in these actions to show a possession of

their own, within twelve years of their present actions, otherwise they cannot be allowed to question the validity of the instrument under which Omrao Singh and his predecessor must be presumed to have held a continued possession since 1836.

As then the evidence on the record adduced by the plaintiffs, being depositions of witnesses only, unsupported by documentary proof of any kind, does not in our opinion establish what the law requires the plaintiffs to prove, namely, a possession within twelve years of the suit; we must hold them incompetent to maintain these actions, and we must reverse the judge's decision with costs in favor of the appellant. Neither do we see any reason why the same decision should not be passed in the case in which Omrao Singh is plaintiff. In that case the judge has held, that Bhuttun had no right to alienate, because a decree had been passed against her in favor of some of the heirs of Golam Allee Khan, her husband, but to the greater portion of the property held by Omrao Sing, this reasoning will not apply, inasmuch as the decree did not affect that portion of the estate of the husband, and even if it did, there are circumstances which would give legal effect to sales by Bhuttun, and there is nothing on the record to impugn the genuineness of the kawala held by the plaintiff. As then nothing on the record really establishes either that Bhuttun could not sell or that Bhuttun did not sell as represented by the plaint, we see no validity in the reasons assigned by the judge for dismissing the claim, and looking at all the circumstances of the case as disclosed in the three other suits before us, we consider the appellant is entitled to a decree in this suit, and with costs against the defendants.

THE 14TH FEBRUARY 1861.

C. B. TREVOR, Esq., Judge, and C. STEER, Esq., Officiating Judge.

Case No. 363 of 1859.

Regular appeal from the decision of Baboo Punchanund Banerjea, Principal Sudder Ameen of Rajshahye, dated 8th December 1858.

Baboo Ram Ruttun Roy and others, (Plaintiffs,) *Appellants.*

versus

Messrs. Willis and Earle and others, (Defendants,) *Respondents.*

Baboos Ramapersaud Roy and *Kishenkishore Ghose* and *Moonshee Ameer Ali*, for appellants.

Mr. R. T. Allan, and *Baboos Sumbhoonath Pundit* and *Sreenath Doss*, for respondents.

Suit laid at Co.'s Rs. 23,729-1.

Held, that the appellant who bought

THIS is a suit for the recovery of the value of an indigo crop cut, carried away, and appropriated by Mr. Bennet, former owner of the

Nazirgunge factory, whose rights, interests, and liabilities, Messrs. Willis and Earle, the respondents, afterwards bought.

Mr. Bennet appears to have long quitted the country, and notice of the action has not been made to reach him.

Messrs. Willis and Earle replied, justifying the conduct of Mr. Bennet, but still pleading on their own behalf, that their purchase of the liabilities of the Nazirgunge concern from Mr. Bennet, does not render them legally liable on account of this action.

The lower court dismissed the suit, and the appeal now preferred against that decision, seeks to open out the whole merits of the case.

As however this appeal is between the plaintiffs and Messrs. Willis and Earle *alone*, for no notice of this appeal has been attempted to be served on Mr. Bennet, the question to be determined before all others is, whether the action can be sustained against the only parties, whom we find present before us in the suit. The primary issue to be tried between them is whether, as purchasers of the rights and liabilities of Mr. Bennet, the present action, which is one in the nature of damages for a wrong done by Mr. Bennet, can be maintained at all against Messrs. Willis and Earle.

the rights and liabilities of a former owner in a certain factory, took upon himself the just debts of the factory, and for the tortuous acts of his predecessor, the remedy for such acts being an action for damages, which is only sustainable against the parties committing the wrong or their privies.

JUDGMENT.

The land from which the indigo was unlawfully cut, was, during Mr. Bennet's time, made over to the plaintiff. It is not pretended that Willis and Earle have ever possessed, or claimed to possess a beegah of the said land, nor have they in any way benefitted by Mr. Bennet's wrongful appropriation. They bought, it is true, the liabilities of Mr. Bennet, and to that extent are privies in estate to him, but they did not buy such a liability as is now attempted to be enforced. What they are liable for are the just debts of the factory, but not the debts arising from the tortuous acts of Mr. Bennet, done before their purchase. Now the suit before us being for damages on account of an unlawful act done by Mr. Bennet himself, Mr. Bennet or his personal representatives are alone liable; for damages are a personal liability, and can only be enforced against the parties or their privies, by whose wrong the actual damage was occasioned.

We, therefore, dismiss the appeal with costs.

THE 21ST FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Regular appeals from the decision of Mr. T. Sandys, Judge of Bhaugulpore, dated the 28th May 1858.

Case No 446 of 1858.

Parbuttee Churn Dutt Jha and others, (Defendants,) *Appellants,*

versus

Issreenund Dutt Jha, (Plaintiff,) *Respondent.*

Baboo Ramapersaud Roy and *Moonshee Ameer Ali,* for appellants.

Baboo Jugdanund Mookerjee and *Kishenkishore Ghose,* for respondent.

Suit laid at Co.'s Rs. 14,281-7-10½.

Case No. 447 of 1858.

Shunker Dyal, (Defendant,) *Appellant,*

versus

Issreenund Dutt Jha, (Plaintiff,) *Respondent.*

Syed Murhumut Hossein, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Suit laid at Co.'s Rs. 438.

As the parties had not had time allowed by law to file their proofs, held, that the case must be remanded, in order that the judge might allow that time and then re-try the case.

IN this case there are two appeals, from one and the same decision. The first, by plaintiff, refers to the legality and justice of the proceedings of the judge under Sections X. and XII. of Regulation 26 of 1814, and to the general merits of the case; and the second an appeal by a co-defendant against the orders of the judge, holding him liable for cost.

The pleader for plaintiff urges, that the judge held proceedings on five consecutive days, from the 17th to the 22nd May, fixing for each proceeding one or more issues for trial, and then decided the case on the 28th, six days only after the last of these proceedings; thus affording the parties no time to produce the proofs necessary for a proper trial.

On a reference to the record we find, that the proceedings were held, as alleged by plaintiff, and that the Section X. proceedings has not only been held contrary to the form laid down in Circular, 8th May 1850, prescribing rules for the proceedings of the Courts under Sections X. and XII., Regulation 26 of 1814, but that substantial injustice is involved in the judge having allowed only six days from the 22nd to elapse before he decided the case. Both parties agree, that they had no time to file their proofs, and having regard to this and to the provisions of Regulation 19 of 1853, which also contemplates that 15 days shall be allowed for the appearance of witnesses, we are of opinion, that the judge's decision

must be reversed. The judge should hold his Sections X. and XII. proceedings in the manner prescribed by Circular Order, 8th May 1850, and he should afford all reasonable time for the parties to produce their oral and documentary evidence in the case, so that he may have before him full means of doing justice between the parties.

The second appeal of the co-defendant, as to his costs, need not be entered into till after the re-trial now ordered.

THE 22ND FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Case No. 408 of 1858.

Regular appeal from the decision of Baboo Punchanund Banerjea, Principal Sudder Ameen of Rajshahye, dated 16th March 1858.

Hurosoondree Debea, (Plaintiff,) *Appellant,*

versus

Bycauntnauth Sandyal and others, (Defendants,) *Respondents.*

Moonshee Ameer Ally and *Baboo Sumbhoonath Pundit*, for appellant.

Baboos Ramapersaud Roy, Kishenkishore Ghose and *Onoocool Chunder Mookerjee*, for respondents.

Suit laid at Rs. 7,657-8.

PLAINTIFF in this case sues for 8-16th share of the putnee of 11 villages. Plaintiff's allegation is, that one Kripanath Sandyal obtained a putnee of all these villages from the zemindars, Bromomoyee and Lukheemoney, and that Kripanath on the 24th Poos 1264, assigned 8-16th of that putnee to plaintiff's husband, Joysunker, exclusively by an ikrar for a consideration of Rs. 3,500; that Joysunker held exclusive possession during his life, but that on his death, Kripanath, and other relatives withheld for plaintiff and her adopted minor son, the possession of Joysunker's 8-16th of the putnee. Plaintiff, therefore, sues for possession and mesne profits.

Plaintiff appealed on the ground that she was entitled to a half share of certain putnee villages, on a deed of assignment executed by one Kripanath. Held on the evidence, that the plaintiff's claim was not proved. Appeal dismissed accordingly.

Plaintiff also claimed to sue on the general right of inheritance by a non-suit of this case, or supplemental plaint. Held, that plaintiff could not thus alter the entire character of her suit.

Defendant, Kripanath, pleads in answer, that plaintiff was only a step-mother of the adopted son, and therefore had no rights of inheritance. This defendant also denies the receipt of the consideration money from Joysunker, and the fact of Joysunker ever having had any right to exclusive possession of the 8-16th of the putnee claimed by plaintiff. It was pleaded by this defendant, that the whole putnee of the 11 villages was taken from the joint funds of the co-partners, and that the possession was joint, viz., of himself and four brothers on one part, and Joysunker and four brothers on the other part, and never exclusively that of Joysunker.

The issues, whether the putnee sued for was exclusively that of Joysunker or joint property, and whether the defendant had illegally

withheld possession from plaintiff, were those tried by the principal sudder ameen, and he held on the evidence afforded by the report of an ameen, who had made a local investigation and who had examined witnesses on the spot, as also by the testimony of three witnesses examined for defendant before the principal sudder ameen, that Joysunker had not exclusive possession of the 8-16th of the putnee as alleged by plaintiff, but that up to Joysunker's death, he, together with four co-sharers, held 8-16th, and Kripanath, together with four other co-sharers, held the other 8-16th, and that after Joysunker's death the plaintiff as guardian of the minor held similar possession, and no more; further, that after the minor's death, Joysunker's nephews, as his heirs at law, held possession of the 8-16th of the putnee, for which plaintiff now sues. The principal sudder ameen considered in detail the oral testimony for plaintiff, and stated his reasons in full for considering it insufficient to establish the plaintiff's claim.

The plaintiff appeals and urges, that the ameen's report was objected to by plaintiff as collusive; that the testimony of the witnesses taken by the ameen was no legal evidence; that plaintiff's own case was proved by her six witnesses; that the deed of the 2[illegible]th Poos 1246, pleaded by appellant was not disproved, nor the fact that the name of Joysunker alone was duly registered in the zemindar's serishta after legal notice, and no objector having appeared after such notice.

JUDGMENT.

It appears that one Kalachund had two sons, Gungagovind and Gourchunder. Gungagovind had five sons, of whom defendant, Kripanath, was the eldest, Gourchunder had five sons, of whom plaintiff's husband, Joysunker, was the eldest. Defendant's statement is, that the whole putnee of the 11 villages was originally taken by Kripanath for all the sharers, and that he subsequently assigned 8-16th of it to Joysunker and his four brothers, keeping the other 8-16th for himself and his four brothers. Plaintiff's statement on the other hand is, that the 8-16th of Joysunker's was his exclusively. After a careful consideration of the evidence adduced by plaintiff to prove the exclusive possession of Joysunker, which she alleges, we cannot find that plaintiff in any way succeeds in proving this. The objections taken by the principal sudder ameen to the character of the testimony of plaintiff's six witnesses are, in our opinion, well grounded. The plaintiff urges that the testimony of the witnesses taken by the ameen is no legal evidence, and that, notwithstanding, the principal sudder ameen has relied on it. The testimony of those witnesses by itself may not be legal evidence, but the report of the ameen based upon it is so, and although the plaintiff urges in

appeal that that report is collusive, she has shewn no good grounds to lead us to admit the plea.

The plaintiff, according to her pleadings, had to prove that her husband, Joysunker, had exclusive possession of the 8-16th of the putnee, to recover which, with the mesne profits, the suit is brought, and she has quite failed in this. We think, therefore, the principal sudder ameen properly decided against her claim.

The plaintiff further urges, that her suit should have been nonsuited, and that she should have been allowed to bring the objectors, her husband's nephews, before the Court by a supplemental plaint, and then have her right tried. The case, page 539, 30th April 1859, Collector of West Burdwan *vs.* Mr. Erskine, is cited in support of this plea. But in that case government had an indirect interest in the land from the nature of the service performed by the ghatwals, and the power of government to remove them, and government, therefore, was brought in by a supplemental plaint as a party. That case had special features of that nature, whereas this has nothing in it to authorize the Court to allow the plaintiff to alter the entire character of her suit, by means of nonsuit or of supplemental plaint.

Considering, then, that the principal sudder ameen rightly dismissed plaintiff's suit, we reject this appeal with costs.

THE 23RD FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., JUDGES.

Case No. 386 of 1858.

Regular appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated the 19th December 1857.

Tarruknath Chuckerbutty, Judoonath Chuckerbutty, and others, (Plaintiffs,) *Appellants,*

versus

The Commissioner of the Soonderbuns and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose, Dwarkanath Mitter, and *Sumbhoonath Pundit,* for appellants.

Baboos Ramapersaud Roy, Poorunchunder Roy, Unoocool Chunder Mookerjee, and *Baneymadhub Banerjee,* for respondents.

Suit laid at Rs. 10,000.

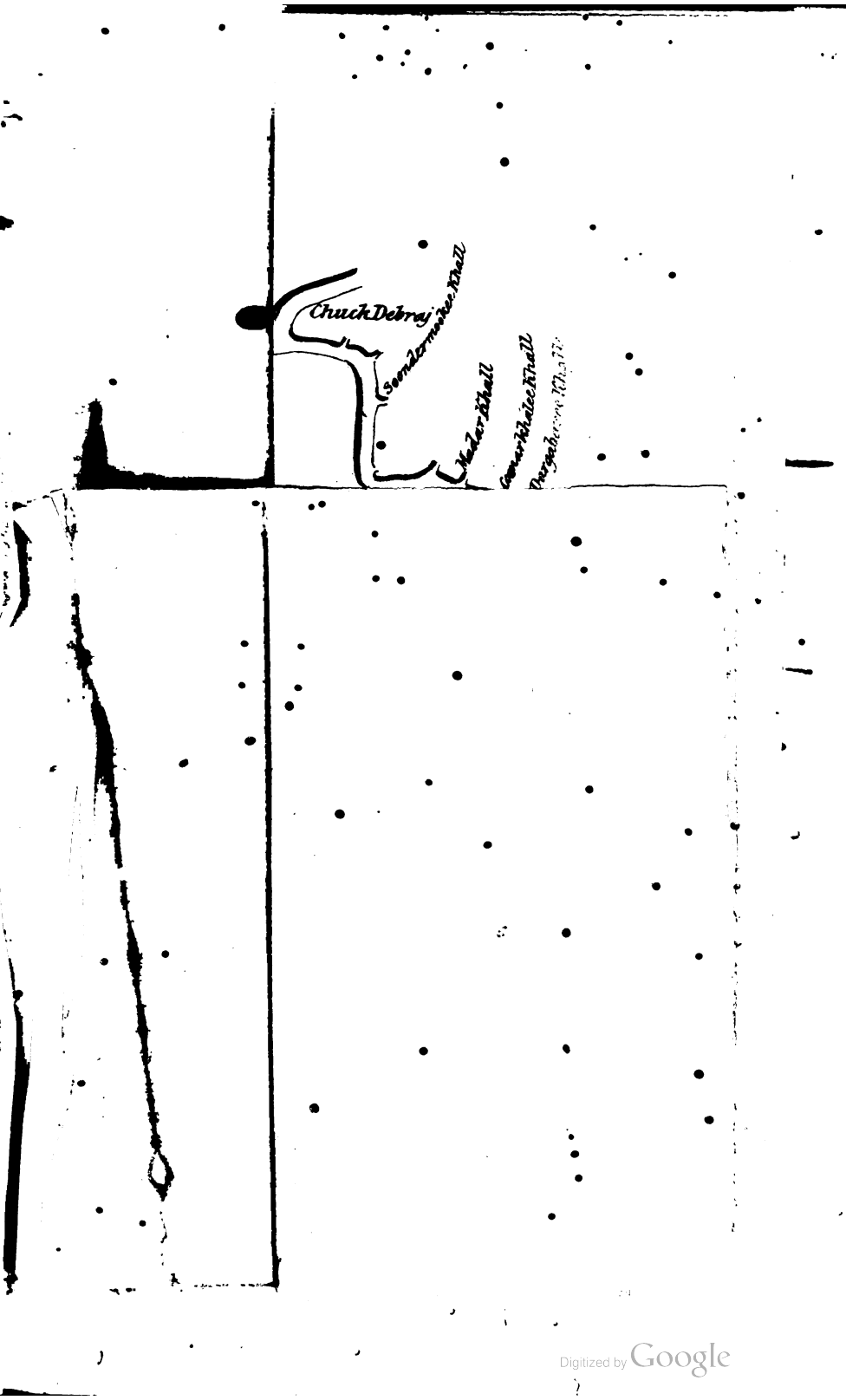
On 17th Bysakh 1248 B. S. = 28th April 1841, plaintiff obtained from government an amulnamah for certain lands in the Soonderbuns, estimated at 4,000 beegahs in Chuks Khoondkerbair, Byentullah, and Manikkola, and comprised within the following boundaries,—east the Manikkola river; south and west the Bhola river;

As plaintiffs failed to prove their right to the land which they claimed as Chuk Manikkola, the ap-

peal was dismissed.

north the Byentullah and Khoondkerbair khals and the Bhola river. In 1849, the plaintiff presented a petition to the Commissioner of Revenue in appeal from an order passed by the Commissioner of the Soonderbuns, stating that he had cultivated Chuks Khoondkerbair and Byentullah, but could not get possession of Manikkola, which lay to the west of the stream called in Mr. Smith's map Manikkola river, owing to the opposition of the defendant Nundokoomar Bagish and others, who claimed the lands as appertaining to their grant of Daooahtollah. The Commissioner on 29th December 1849, ordered possession of the lands lying to the west of the Manikkola river in Smith's map, to be given to the petitioner up to the first imaginary line drawn on that map, comprising 10,082 beegahs. In carrying out the instructions of the Commissioner, the Deputy Collector, Mr. Smith, laid down the second imaginary line, and so gave plaintiff possession of a further area of 3,327 beegahs, and in the course of his proceedings stated that he thought the proper boundary of Manikkola extended to the third imaginary line in his map, (see sketch annexed) and that plaintiff was entitled to possession to that extent. The Commissioner of Revenue acting on this report, directed possession to be given to the plaintiff accordingly, but on an appeal to the Board of Revenue by the defendants, Nundkoomar Bagish, this order of the Commissioner was reversed on 14th October 1851, and the plaintiff's possession was restricted to the area comprised within Smith's first imaginary line as Manikkola Chuk. The object of the present suit is to set aside this order of the Board of Revenue, and to obtain possession of the land lying between the first and third imaginary lines of Smith's map.

In disposing of this case, it is necessary to look, not so much to the area granted, or in the possession of the appellant, as to the boundaries recited in the grant. It is evident, that the area mentioned in plaintiff's amulnamah was merely a vague estimate upon which to base a claim for rent, the amount of which would be finally settled after regular survey and measurement. If therefore plaintiffs be able to satisfy the Court that the boundaries entered in their amulnamah comprise the lands now claimed by them, be the area 4,000 beegahs or 40,000 beegahs, we should consider plaintiffs entitled to have possession of them. In support of their claim, plaintiffs' counsel asserts that the river marked in Smith's map as Foolhutta, originally bore the names of Foolhutta and Manikkola, as is evident from an old paper in the office of the Board of Revenue of 1192, called a "chinitnamah," which, however, has not been produced in this case. That this stream, as is the case with other rivers and streams in the Soonderbuns, changes its name according to the estate or chuk



through or by which it passes; that the upper part, where it passes the defendants' grant, is known as the Foolhutta, and the lower part, where it passes Manikkola, is called by that name. It is further urged, that the Manikkola river, running through the centre of Smith's map, though it may now bear that name, could not have been the stream mentioned in the amulnamah of 1841, because it is evident that Chuk Manikkola lies to the west of that stream, and this fact is further proved from the map of an ameen (filed by the defendants) deputed in 1834, before either of the contending parties had any interest in the disputed lands to ascertain the extent of the cultivated area in the grant now settled with the defendant, Bagish. That this officer, in the course of his inquiries laid down the boundary between defendants' grant and Chuk Manikkola, which corresponds with Smith's third imaginary line, and extended from the Daooahtullah khal on the west to the Goolbunga khal on the east. That the fact of Chuk Manikkola extending to the third imaginary line is further proved by the settlement made with the defendant, Bagish, of about 270 beegahs of land marked in Smith's map, and which the defendant himself admitted to be Chuk Manikkola when he agreed to the settlement.

On comparing Smith's map with the map of the ameen prepared in 1834, we think the appellants have completely failed in making out that the Foolhutta also bears the name of Manikkola. They have failed to produce the chinitnamah of 1192, which document they quote in support of this averment, and allege, as a reason for its non-production, that they were refused a copy when they applied for it. There was, however, nothing to prevent their requiring the Board of Revenue to produce the original when the suit was under trial, but this they abstained from doing; and they can produce no documentary evidence to support this plea, for the proceeding of the Commissioner of Revenue of 28th December, quoted by them, is not to the purpose, for when he speaks of the Manikkola and Foolhutta streams, it is with reference to the boundaries of lot Dakra, which comprised the chuks in defendants' grant and others, and he evidently speaks of them not as one to the same, but as two distinct streams forming the southern boundary of that lot which had been resumed by government on failure of the former grantee to comply with the terms of his engagement. The ameen's map, roughly drawn though it be, corresponds in a remarkable manner with Smith's map, and shews that the stream to the east of the disputed lands is called the Foolhutta, and that it falls into the Bhola on the south, and that another stream, corresponding to the Manikkola of Smith's map, does bear that name, and also falls into the Bhola, thus clearly proving

that the Manikkola, by which the centre stream is called, and which the defendants assert is the eastern boundary of plaintiff's grant, is not a new name recently given to that stream, but its proper and original name. It is, however, also evident from the ameen's map, that there is some land to the east of the Manikkola as above described, bearing the name of Chuk Manikkola, and it is asserted by the appellant, that the boundary of that Chuk, as laid down by the ameen, corresponds with the third imaginary line of Smith's map, and extends from the Daooahtullah khal to the Goolbunga khal, which falls into the Foolhutta. The grounds for this assertion are, first, that the ameen in his report, gave the boundaries of the Chuks now comprised in the defendants' grant, and stated that to the south to be the Daooahtullah khal, and the thick jungle, and secondly, that he measured some spots of cleared land in three daghs to the south of the Goolbunga khal, but in giving a detail of the lands measured by him as appertaining to the Chuks now comprised in the defendant's grant, he omitted these three daghs, evidently shewing thereby, that he did not consider them as part of Chuk Daooahtullah. Now it must be remembered, that when this ameen was deputed, the defendant was not in possession, and the ameen was deputed not to determine the boundaries of the lot, but to ascertain the extent to which clearance and cultivation had been carried previous to the government exercising their right of resumption, when the grantee had failed to comply with the conditions of his lease. Any incidental mention, therefore, of boundaries in such a report cannot be binding on the defendants. Further we find, no mention of the Goolbunga khal in the ameen's report as forming the east end of the southern boundary of Daooahtullah and other Chuks; and his omission to enumerate certain daghs to the south of the Goolbunga khal which he had measured without assigning any reason for the omission, is insufficient to conclude the defendants, or to prove that Chuk Manikkola extended to that point. Another point brought to our notice, though not much pressed, was that the defendant took the settlement of certain lands brought into cultivation by him, knowing them to form part of Chuk Manikkola and admitting such to be the case. These lands, as shewn in Smith's map, are situated to the south and east of Daooahtullah khal, and north and west of Julaykhalee; but on reference to the settlement proceeding, we do not find that defendant has admitted these lands to be in Chuk Manikkola. The settlement officer asserts that they are, (but on what data do not appear) and finding them in the possession of the defendant, asked him whether he would take a settlement of these lands as Chuk Manikkola. Rather than lose the lands which he had brought into cultivation, the defendant consented to do so, but we do not think

he is thereby debarred from pleading, that the land appertains to his grant and forms no part of Chuk Manikkola. The third imaginary line laid down by Smith, appears from his proceedings of 6th April 1850, to have been adopted with reference to a proceeding of the Commissioner of the Soonderbuns. This document has not been produced, and we are unable to ascertain the grounds upon which the order was passed, and whether it is binding on the defendants or not. The position, therefore, of the plaintiffs stands thus: they obtained a grant from government of 4000 beegahs in Chuks Khoondkerbair, Byentullah, and Manikkola within defined boundaries. These boundaries comprised by actual measurement an area of 13,393 beegahs, which, as alleged by plaintiff, appellant, appertained to Chuks Khoondkerbair and Byentullah. They demanded to have possession given them of Manikkola as within their lease, and the Board of Revenue permitted them to receive 10,082 beegahs *not* included in the boundaries of their lease, although the area of that Chuk, in the resumption order was estimated only at (1000) one thousand beegahs, under these circumstances it is evident to us, that the boundaries mentioned in the plaintiff's amulnamah are the boundaries of Chuk Khoondkerbair and Byentullah; that the Manikkola khal, as laid down in Smith's map, is the real Manikkolla, and that the stream which plaintiff avers to be the Manikkolla, is in fact the Foolhutta, and the government having discovered that the above boundaries did not comprise Chuk Manikkola, gave the plaintiff 10,082 beegahs beyond the boundary, in order to satisfy the conditions of the lease without trespassing on the rights of other *parties*. We think, that if the plaintiffs claim a larger area, extending to the third imaginary of Smith's map, they are bound to prove clearly and satisfactorily, which they have failed to do, that Chuk Manikkola does extend to the line claimed by them. As they have failed to do this, we confirm the decision of the lower court, and dismiss the appeal with costs.

THE 23RD FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Case No. 357 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Judge of Jessore, dated 23rd April 1858.

Baboo Huronath Roy, (Plaintiff,) *Appellant,*

versus

Madhub Chunder Chowdhree and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Ramapersaud Roy*, for appellant.
Moonshee Ameer Ally and *Mr. R. T. Allan* and *Baboos Ashootosh Chatterjee, Sumbhoonath Pundit, Chundernath Chatterjee, Ramanath Bose*, and *Tarucknath Sein*, for respondents.

Suit laid at Rs. 32,803-8-5.

Claim decreed, as from the whole of the evidence it appeared that the Elangeedhara khal, as pointed out by the plaintiff, was the real boundary between the villages and pergunnahs.

PLAINTIFF, as proprietor of a three anna share of pergunnah Nusserutshye, purchased at a sale for arrears of government revenue, sues to recover possession of 31 kadahs, 9 pakees of land of Thakoorpara bheel, Mouzah Geekumla, in pergunnah Nusserutshye, from which he alleges, he was dispossessed by an order of the session judge passed on 20th December 1843. The defendants claim the land in dispute as appertaining to bheel Dhamoo, pergunnah Mohimshye. Both parties admit that the Elangeedhara khal is the boundary between the two pergunnahs; that if the land be situated to the west of the khal, they belong to Nusserutshye, if to the east to Mohimshye. The position, therefore, of the Elangeedhara khal is the chief point to be determined.

Plaintiff sued to set aside the session judge's order of 20th December 1843, by which that officer very irregularly, it is alleged, reversed a decision of the magistrate of 14th December 1842, affirming the plaintiff's possession. The suit was instituted on 5th September 1845, and plaintiff obtained a decree, but on appeal the Sudder Court on 18th April 1850, nonsuited the case for defect of parties. Plaintiff then instituted a fresh suit on 31st August 1851, which, after local investigation by two moonsiffs, was also nonsuited by the court of first instance on 25th February 1856, for defect of parties, plaintiff then filed the present suit on 10th March 1856, which was dismissed by the judge on 22nd April 1858, and from this decision the present appeal has been preferred.

It appears that in 1831, the plaintiff and Baboo Ram Kuttun Roy claimed certain lands in bheel Dhamoo, pergunnah Mohimshye, and in bheel Thakoorpara, pergunnah Nusserutshye, as belonging to the lakhiraj estate dedicated to the goddess, Kali. In these cases, which appear to have been instituted under the provisions of Regulation XV. 1824, both the contending parties laid down the boundaries of the lands in dispute, and clearly shewed that the boundary between

the two villages and pergunnahs was the Elangeedhara khal, and a map filed in the case by the present defendants shewed that the Elangeedhara khal was continued at its southern extremity by the Boaldhara khal. The claim of Ramruttun and Huronath was dismissed by the joint magistrate on 19th August 1831. Some order, not before the court, emanating from and to give effect to the above decision, and the decision passed in the Thakoorpara case was issued, as may be gathered from the subsequent proceedings of the magistrate in 1834, and Commissioner in 1835, the purport of which was mistaken by the thanna mohurrer, and his proceedings led to disputes between Ishwur Chuckerbutty, zemindar of Nusserutshye and Kalisunker Chowdhry, ancestor of the present defendant, zemindar of Mohimshye, relative to the boundary between the bheels Thakoorpara and Dhamoo. The darogah was directed to lay down the line, but from his report of 9th March 1832, which he submitted with a rough map of the land, it appears that he was unable to determine any thing satisfactorily as to the boundary. On 5th August 1834, the joint magistrate after reciting how the dispute between the parties had arisen, and having ascertained from the darogah's report, or by other means that some low land lay between the two bheels, determined as the best means of settling the dispute, that the line should run along this low land, and directed possession to be given accordingly. From the proceeding of the joint magistrate just quoted, it appears that the plaintiff had at that time become proprietor of the share of pergunnah Nusserutshye, formerly belonging to Ishwur Chuckerbutty, and he appealed to the Commissioner of Circuit, from the order passed by the joint magistrate. The Commissioner on 9th February 1835, reversed the order of the joint magistrate, and with reference to the decision of 1831, in which the boundary had been clearly defined, directed the appellant to be put in possession of the land up to the Elangeedhara khal, and this order was carried out as appears from the darogah's report of 19th June 1835. In 1842, disputes again arose between the parties, and the magistrate, on 14th December 1852, having brought the case under Act IV. of 1840, gave an award in favor of the zemindar of Nusserutshye. No appeal appears to have been preferred by the zemindar of Mohimshye from this decision, but on a subsequent order passed by the joint magistrate, sentencing Srinath Mytee, mooktear of the Mohimshye zemindar to a fine of Rs. 50, and dismissing him from his situation of mooktear on account of his having brought unfounded charges of forgery against the amlah of the fouzdary court, the judge in an appeal preferred by Srinath for the reversal of this order, entered into the question of the dispute then existing between the zemindars, and on 20th December 1843, reversed the

magistrate's decision, both in respect to the possession of the land and of the sentence passed on the mooktear, and under cover of this order, it is alleged by the plaintiff, that defendants have taken possession of lands to the west of Elangeedhara khal, as appertaining to their property bheel Dhamoo.

It must be borne in mind, that the present suit is not of a similar character to that instituted by the plaintiff, and Ram Ruttun in the case under Regulation XV. 1824. In that case plaintiff sought as sebaits to get possession of certain lands in bheel Dhamoo, in pergunnah Mohimshye, as belonging to the lakhiraj estate dedicated to the idol Kali. In this case, plaintiff as proprietor of 3 annas of pergunnah Nusserutshye, seeks to recover possession of certain lands, from which he alleges, he has been ejected by the defendant, and he avers, that these lands lying to the west of the Elangeedhara khal, the admitted boundary between the two pergunnahs of Nusserutshye and Mohimshye, belong to him as part of bheel Thakoorpara.

In determining the position of the Elangeedhara khal, it is necessary to refer to the decision and map of 1831, the latter being prepared and filed by the defendant. The land of bheel Dhamoo, then in dispute, was stated by both parties to be bounded on the east by the villages of Gungaram and Madhubpoor; on the west by the lands of Geekumla and the Boaldhara Nulla; on the south by the village of Naroa; and on the north by the Elangeedhara khal and Thakoorpara. On reference to the map then filed, it appears that the Elangeedhara khal or nulla, as it seems to have been indifferently called, flowed on the west and north of the disputed area; that the lands of Thakoorpara are situated to the north and west of the Elangeedhara khal, and attached to Geekumla; that the houses of the ryots of Thakoorpara are to the north-west, and that the Boaldhara khal runs from the southern extremity of the Elangeedhara khal southward, past the village of Bamsatdanga on the east. In 1835, when the darogah was deputed to give possession under the Commissioner's orders of 9th February, he reported on 19th June, that he had marked the boundary by sticking up the bamboos on different parts of the line near the houses of three ryots. When disputes again arose in 1842, plaintiffs referred to that possession then given, and allege that the bamboos then erected by the darogah were in front of the houses of Kulumoodeen, Tucky Mahumed, and Mahumed Bakir, and the magistrate sent the original map filed in 1831 to the darogah, for him to ascertain the position of those houses. Now that map shews the house of Kulumoodeen to be at the north-east of the Elangeedhara, and Tucky Mahumed's house about the middle. It is averred by the defendants that the map did not originally bear these names or mark the sites of

these houses, which were interpolated when the original map was sent to the darogah in 1842, for inspection and comparison with the land. Had these houses been mentioned, there never could have been any difficulty, it is urged, in determining the course of the Elangeedhara in 1832 and 1834, and it was, because the defendant's mooktear Srinath Mytee charged the amlah and police with tampering with the map, that he was punished, though the mahafez of the magistrate's record office admitted in his report that there appeared to be some alterations in the map. It is admitted by the defendant, that the houses of Kulumoodeen, Tucky, and Bakir Mahumed, are situated on the bank of the more eastern khal represented in the moonsiff's map, and which the plaintiff calls Elangeedhara, but it is urged by defendant that this is the Durikhal shewn in the map of 1831, that on reference to the very imperfect map of the darogah, prepared in 1832, it shews a road and a bridge clearly in bheel Dhamoo, and the moonsiff's map recently prepared in this case shews a similar road and bridge in the lands in dispute; that further, it will be observed by reference to the map of 1831, that the Elangeedhara at the north-west divides itself into two branches, that the land which lies between is the origin of all the present disputes, for after the decision of 1831 was passed, the Mohimshye zemindar claimed it as bheel Dhamoo, and the Nusserutshye proprietor called it Thakoorpara, that the more southerly of these two branches of the Elangeedhara passed on the south-east of the Thakoorpara homesteads, and being now dried and filled up is represented by an imaginary boundary on the moonsiff's map, while the more northerly, which is still in existence, runs as represented in the moonsiff's map to the north-west of that village. It is urged further, that the map of 1831 shews the Boaldhara khal to be a continuation of the Elangeedhara; that what is pointed out by plaintiff and represented in the centre of the moonsiff's map as the Boaldhara, is not that khal which lies more to the west, and that such is found to be the case by the moonsiff's investigation.

While we admit that the arguments advanced by the respondent's pleader are of considerable force as regards the demarcation of the houses of Tucky and Kulumoodeen in the map of 1831, he has failed to shew us that the map in question has been fraudulently altered, nor does the judge in deciding this case lay any stress upon this alleged alteration. It is now almost illegible. Had it been tampered with, as stated by the respondent, we think the Mohimshye zemindar would not have failed to make an appeal from the decision of the magistrate in 1842. It is said that an appeal was preferred. It is true that the magistrate's order of 14th December 1842 was reversed by the judge on 20th December

1843, but the appeal then before the judge was that made by Srinath Mytee, who had been punished by the magistrate on 19th July 1843, for bringing false charges of forgery, and how the decision of the magistrate in the Act IV. case was imported into and decided by the judge in that appeal has not been shewn us. The word Durikhal almost effaced in the original map, on which the respondent lays considerable stress, appears to be an incomplete word, and therefore nothing can be made out of it, and the darogah's map of 1832 is of such rude construction as to form no guide to us in the present case. As to the argument advanced by the respondent's pleader regarding the two branches of the Elangeedhara khal, we hold it to be untenable, for the map of 1831 shews the village of Thakoorpara to be to the west of the khal before it separates into the two branches, and the land between the two branches is described as the "matan zameen" of Thakoorpara. It is evident, however, from the moonsiff's map prepared in the case that the village of Thakoorpara is to the east of the khal pointed out by the defendant as the Elangeedhara; and we are not shewn when it was, if this be the Elangeedhara, that the ryots came across the stream and established their houses on the eastern bank, nor is it probable had they done so that the defendant, whose boundary was declared to be the Elangeedhara, would have permitted them to trespass upon and take possession of his property without remark or complaint. Looking then to the whole of the evidence placed before us in this case, meagre though it be, we think the Elangeedhara khal mentioned in the proceedings of 1831, and admitted to be the boundary between the two villages and pergunnahs is, as pointed out by the plaintiff and laid down in the moonsiff's maps, and that the lands now in dispute lying to the west of that khal, appertain to the plaintiff's villages of Thakoorpara, Geekumla, pergunnah Nusserutshye. We, therefore, reverse the order of the lower court, and decree for the plaintiffs with costs and mesne profits to be recovered from the principal defendant, zemindar of Mohimshye, such mesne profits when ascertained by local investigation, to bear interest from the date of ascertainment. The other defendants to be released, but the defendants' putneedars who, with the zemindar defendants, have resisted the plaintiff's claim, will bear their own costs.

THE 26TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Regular appeals from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated the 21st May 1858.

Case No. 419 of 1858.

Raja Burodakant Roy, (Plaintiff,) *Appellant,*

versus

Punchanund Bose and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose, Ramapersaud Roy, and *Obhoy Churn Bose,* for appellant.

Baboo Sumbhconath Pundit and *Mr. R. T. Allan,* for respondents.

Case No. 285 of 1859.

Punchanund Bose and others, (Defendants,) *Appellants,*

versus

Rajah Burodakant Roy, (Plaintiff,) *Respondent.*

Baboo Baney Madhub Banerjee, for appellants.

Baboos Kishenkishore Ghose and *Obhoy Churn Bose,* for respondent.

Suit laid at Rs. 2,927-5-9.

CERTAIN Dewuttur lands in Mouzah Ghosal, Kuttallah and Bhetkee, dedicated to the idol, Shagur Roy Thakoor, of whom plaintiff was the sebait, were resumed in 1842, under the provisions of Regulation II. of 1819, and a settlement was ultimately made with him in 1851, when he paid up the arrears of government revenue due from 23rd November 1842 = 24th Kartick 1249, to the date of settlement, 30th April 1851.

Plaintiff then demanded rent from the defendants in possession for the year 1258, at the rate of settlement, and on their failure or refusal to pay, instituted summary suits and obtained decrees. Defendants sought to set aside these decrees by regular suits, in which, however, they failed, plaintiff now brings an action to recover rent from the defendants, for the period extending from 23rd November 1842 to the end of 1257 = 1851, at the rates assessed by the settlement officers, *minus* the rent paid by them during that period to Choto Singh and Nekal Singh, mortgagees, who hold possession of the resumed land under a deed executed by the plaintiff's father. Plaintiff asserts his right to this rent on the ground, that he has paid all arrears to government at the settlement jumma, and he has by so doing obtained a right to collect rents at these higher rates which government might have claimed. The defendants plead certain mouroosi leases of 1195 and 1201, given by the ancestor of the plaintiff under which their jumma

Government resumed certain lands, but took no steps to assess them or to realise rents from the ryots. About ten years after resumption, a settlement was made with the malik, who agreed to pay the amount of revenue due to government, at the settlement jumma, for the back period from six months after resumption to the date of settlement. Having done so, he brings the present action to recover from certain lessees, who have regularly paid their rents according to the terms of

the lease granted by his ancestor, the difference of their jumma under the lease and the jumma assessed on their tenure by the settlement officer. It was held, that until the lands were measured and a fresh jummabundy had been prepared, the ryots were not liable to pay enhanced rents, and therefore, were not bound to pay such enhanced rents for past years.

was fixed, and at which rate they have hitherto paid first to the lessor, and then to the mortgagees, and they urge that they cannot now be required to pay a higher rent.

The judge dismisses the claim on the ground that though it may have been hard on the plaintiff to make him pay up the arrears of revenue from six months after the date of resumption, yet that doubtless, he obtained some benefit from the settlement being made with him, but it would be still harder to make the defendant pay up these back rents, who had all along acted in good faith and paid their rents according to their leases; that though he did not consider these leases to be mouroosi or invariable, yet for past years, he did not consider the plaintiff entitled to have any just claim on the defendants.

An appeal is preferred on the ground that the resumption of the tenure sets aside all arrangements and leases entered into previous to resumption, as ruled by this court in the case of Mohunt Sheodass, decided on 2nd May 1850, (page 167) that as plaintiff has paid the government revenue from the time when it became demandable after resumption at the settlement jumma, he is entitled to recover at the same rate from the under-tenants.

We find that the defendants have held the lands for which rent is now demanded, at an yearly rent of Rs. 173-1-1, under leases received from the plaintiff's ancestor; that they have continued to pay this rent up to the close of 1257 to the mortgagees, who held the property also from plaintiff's ancestor. Plaintiff now seeks to recover the difference between the above rent and the jumma assessed on these lands at the time of settlement, amounting to Rs. 337-13-7, from the 23rd November 1842, when the government right to realize revenue first accrued to the 30th April 1851, or to the close of 1257, on the ground, that he has paid up the government revenue for that period. The right of government to realize revenue from the resumed land commenced, no doubt, from the date above specified, but till a fresh jummabundy were made, of which the tenants were cognizant, the revenue could only be realized at the rates payable at the time of resumption. For some unexplained reason the government does not appear to have interfered with this estate till 1851, when it was for the first time assessed and settled. We question very much whether even government could, under such circumstances, have realized the back rents at the enhanced rates without some stipulation on the part of the tenants to pay up, and we think the plaintiff's right to demand rent at the settlement rates commences only from the date when the fresh jummabundy prepared by the settlement officers was finally adjusted and adopted as the basis of settlement. Our decision on this point renders it unnecessary to express any opinion as to the nature of the lease propounded by the defendants,

and we dismiss this suit with costs, confirming thereby the judgment of the lower court.

The appeal of Punchanund Bose, which has been instituted as a measure of precaution, must also be dismissed with costs.

THE 28TH FEBRUARY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Regular appeals from the decision of Baboo Rae Tarucknath Sein, Principal Sudder Ameen of 24-Pergunnahs, dated 30th December 1857.

Case No. 329 of 1858.

Bebee Woomdutoonnissa, (Defendant,) *Appellant,*

versus

Mussamut Shumsoonnissa Begum and others, (Plaintiffs,) *Respondents.*

Baboos Gobind Chunder Mookerjea and *Beneymadhub Benerjea,* for appellant.

Moonshee Ameer Ally, and *Baboos Chundernath Chatterjea* and *Dwarkanath Mitter,* for respondents.

Suit laid at Co.'s Rs. 1,672-10.

Cases Nos. 330 and 331 of 1858.

Bebee Woomdutoonnissa, (Defendant,) *Appellant,*

versus

Mussamut Shumsoonnissa Begum, and others, (Plaintiffs,) *Respondents.*

Baboos Gobind Chunder Mookerjea and *Beneymadhub Banerjea,* for appellant.

Moonshee Ameer Ally, and *Baboos Ramapersaud Roy, Chundernath Chatterjea,* and *Dwarkanath Mitter,* for respondents.

Suit laid at Co.'s Rs. 2,508-15-1.

Cases Nos. 332 and 333 of 1858.

Kazee Mohamed Aumah and others, (Defendants,) *Appellants,*

versus

Mussamut Shumsoonnissa Begum and others, (Plaintiffs,) *Respondents.*

Baboo Kishenkishore Ghose and *Syed Murhumut Hossein,* for appellant.

Moonshee Ameer Ally, and *Baboos Ramapersaud Roy, Chundernath Chatterjea,* and *Dwarkanath Mitter,* for respondents.

Suit laid at Co.'s Rs. 24,254-3-18.

Case No. 334 of 1858.

Mussamut Shumsoonnissa Begum, (Plaintiff,) *Appellant*,
versus
Kazee Mohamed Aumah and others, (Defendants,) *Respondents*.

Moonshee Aheer Ally and *Baboos Ramapersaud Roy*, *Chundernath Chatterjea*, and *Dwarkanath Mitter*, for appellant.

Baboos Kishenkishore Ghose and *Gobindchunder Mookerjea* and *Syed Murhumut Hossein*, for respondent.

Suit laid at Co.'s Rs. 24,984-10.

Three suits for the property left by Nujjumo onnissa, daughter of Hossein Ally, were instituted, one by her husband Ahmed Ally, who said his deceased wife was a Sheah, and as such he was entitled to eight annas. The second case was brought by her mother, Kurumoonnissa, she also said deceased as well as herself, were Sheahs, and she also claimed an eight annas share. The third suit was brought by Shumsoonnissa who alleged that her sister, the deceased Nujjumoonnissa was a Soonee, that as such the husband was entitled to six, the mother to four, and the sister to six annas of the deceased's property. Defendants, who are widows of Hossein Ally, claimed the property as their dower, and Woomdut-

Moonshee Hossein Ally died on 1st Kartick 1244 B. S., 16th October 1837, leaving three widows, Ashrufoonnissa *alias* Nujeeba Banoo, Woomdutoonnissa and Kurumoonnissa, and a daughter Shumshoonnissa by his wife Kurumoonnissa, and a nephew Booh Ally, his legal heirs. Another daughter, Nujjumoonnissa by Kurumoonnissa, who was pregnant at the time, was born after Hossein Ally's death.

Disputes arose between the nephew and the other members of the family, regarding the distribution of his property, and litigation commenced in 1838, but the suit of Booh Ally was compromised by an ikrar of 23rd July 1838, to which all the heirs of Hossein Ally, including his daughters, who were represented by their mother as guardian, were parties; and under that agreement arbitrators were appointed, who divided the property of the deceased among the heirs according to the "*Shurra*." The arbitration award was submitted to the Court on 19th July 1839. By that time Shumsoonnissa had come of age, and objecting to the terms of the ikrar or agreement of July 1838, as injurious to her interests, and the subsequent arbitration founded thereon, she filed a petition in her own and minor sister's name on 21st February 1840, praying the judge to withhold his sanction to the award. Her application was rejected, and on summary appeal to the Sudder Court, the order of the judge was confirmed on 21st November 1841, the Court, however, taking the precaution to require that the shares of the deceased's property claimed by the two sisters should be deposited in court, and leaving Shumsoonnissa to proceed by regular suit. On 4th March 1842, Shumsoonnissa brought a suit to set aside the ikrar of July 1838 and the arbitration bond, and got a decree on 2nd September 1843. In this decision, Woomdutoonnissa and Kurumoonnissa acquiesced, but Ashrufoonnissa appealed to the Sudder Court, which appeal was adjusted by the parties who agreed that half the money in litigation should be set aside for Nujjumoonnissa, and the other half should be divided between Shumsoonnissa and Ashrufoonnissa, and other conditions were made regarding portions of landed property which were to come to Shumsoonnissa on the death of Ashrufoonnissa. Nujjumoonnissa married Mirza Ahmed, and died on

15th Bhadur 1246, 30th August 1839, leaving three heirs, her husband, her mother, and her sister, Shumsoonnissa. Suits were then instituted to recover from the heirs of Hossein Ally, the property, of which Nujjumoonnissa died vested, one by her husband in case No. 26 of 1851, and another by her mother, Kurumoonnissa, in case No. 28 of the same year. Both these claimants stated, that they were of the *Sheah* sect of Mahomedans, that Nujjumoonnissa lived and died a *Sheah*, and that under the law of inheritance which prevailed among the *Sheahs*, they were the sole heirs of the deceased, and as such, entitled each to an eight anna share of her property. A suit, No. 64 of 1851, was subsequently filed by Shumsoonnissa, who declared that Nujjumoonnissa was not of the *Sheah*, but of the *Soonee* sect, and that by the law of inheritance among *Soonees*, she was entitled to a six annas share of the deceased's property, and Mirza Ahmed to six annas, and the mother to four annas. Kurumoonnissa died in March 1853, leaving Shumsoonnissa her sole heir, and on her application, her name was substituted as plaintiff in the suit brought by Kurumoonnissa, on 16th August 1853. Shumsoonnissa also purchased from Mirza Ahmed, all his rights and interests in the property of Nujjumoonnissa, and on 15th August 1853, was made plaintiff in lieu of Mirza Ahmed in the suit brought by him. On a razeenamah being filed by these parties, the principal sudder ameen struck off all three cases, on which Shumsoonnissa appealed to the Sudder Court, stating that though she had come to a settlement with Mirza Ahmed, her claim against the other defendants was not affected thereby, and as regards them, she required the investigation to proceed; and on the 4th February 1854, the suits were again brought on the file by order of the Sudder Court. The principal sudder ameen then looking at the anomalous position in which Shumsoonnissa was placed as plaintiff in all three cases, in one of which, she claimed as a *Soonee*, and in the other two as representative of Kurumoonnissa and Mirza Ahmed, she claimed as a *Sheah*, and was herself in those two cases, a defendant, contesting their right to claim the whole property as *Sheahs*, and declaring that Nujjumoonissa lived and died a *Soonee*, and as such, she, Shumsoonnissa, was entitled to a share in her property as a legal heir, nonsuited the cases, directing her to bring a fresh suit, as her claim could not be tried in the form then before the Court. Shumsoonnissa then filed an appeal to the Sudder Court, and by an order in the miscellaneous department, the order of nonsuit was reversed on the 27th March 1857, the presiding judge holding, that as Shumsoonnissa was now sole heir to Nujjumoonnissa, and plaintiff in all three suits, the question as to the difference of the course of inheritance among *Sheahs* and *Soonees* could not arise, and there was consequently nothing to prevent the

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as representative of Kurumoonnissa, as he held that Kurumoonnissa, who had previously for herself and as guardian for her daughters, executed an ikrarnamah admitting the right of the defendants to this money as their dower, was estopped by her own act. Six appeals were preferred. The Court rejected the two preferred by Ashrufoonnissa who claimed dower, also the appeal of Shumsoonnissa, holding the decision of the principal sudder ameen in regard to Kurumoonissa's claim to be correct, and as Woomdutoonnissa withdrew her three appeals, the question as to the course of inheritance, as Nujjumoonnissa was found to be a Sheah or Soonee was no longer before the Court, and the decision of the principal sudder ameen was affirmed.

hearing of the suits. Shumsoonnissa then filed a petition in the principal sudder ameen's court, praying, that as she was now sole heir, and entitled to the whole of the property of the deceased, judgment might be given in Mirza Ahmed's and Kurumoonnissa's cases, not for the shares for which they brought their action, but according to the *Soonee* law, for six annas share in the former and four annas share in the latter, and that she might be allowed to prosecute her own claim for six annas. The principal sudder ameen has treated all three cases as one, and acting on the orders of this Court, has not investigated the issue raised in the pleadings as to the course of inheritance under the law as prevailing among the *Sheahs* and *Soonees*, and has given Shumsoonnissa a decree for twelve annas in her own right and as representative of Mirza Ahmed, but dismisses her claim to four annas share as heir of Kurumoonnissa, as he considered Kurumoonnissa estopped from claiming any share, she having been a party to the ikrarnama in 1838, in which she had admitted the right of the defendants to this property.

From this decision six appeals have been preferred, one on the part of Shumsoonnissa, in regard to the order dismissing her claim to a four anna share of the property as heir to her mother, two by Ashrufoonnissa in the cases respectively brought by Shumsoonnissa and Mirza Ahmed, in which her claim for dower has been rejected, and three by Woomdutoonnissa from the decision passed in each of the cases which is adverse to her.

The contention between the parties in each suit may be briefly stated as follows. Shumsoonnissa claimed a sixth of the property, to which her sister was entitled from her father Hossein Ally, and which, under the operation of the agreement of 23rd July 1838, had been excluded from partition, and for this purpose, she sued to set aside that agreement and the subsequent arbitration award. She also sued for her share of her sister's dower, payable by her husband, Mirza Ahmed, as well as of any property of which she died possessed. Kurumoonnissa and Mirza Ahmed sued for their shares of any property of which Nujjumoonnissa died vested, and they consequently sought to set aside the agreement of 1838, and the arbitration award. On the part of the defendants it was contended by Ashrufoonnissa, that she was, under a certain kabinnamah executed by her husband, entitled to a dower of 1,50,000 Rs.; that when the disputes among her husband's heirs were adjusted in 1838, she agreed under the ikrar then drawn up to receive in lieu thereof the sum of 1,15,000, besides some houses and 6,000 Rs. cash, found in her possession; that the property now claimed is part of her dower to which Nujjumoonnissa had no claim. She states further, that the members of the family are all *Soonees*. Woomdutoonnissa in all three cases makes the same claim of dower, and alleging that Nujjumoonnissa

lived and died a *Sheah*, and calling herself a *Sheah*, questions the right of Shumsoonnissa, a *Soonee*, to claim any portion of Nujjumoonnissa's property, her only legal heirs being her mother and husband.

We think the proper course to have been adopted by the principal sudder ameen when the cases were remanded in 1854, was to allow Shumsoonnissa to proceed either with her own case, or with the other two, as heir and representative of Kurumoonnissa and Mirza Ahmed, respectively, and to have tried the question, put in issue in all three cases, viz., whether Nujjumoonnissa was a *Sheah*, and the property was to revert to her heirs according to the law of that sect. Had she elected to go on with her own case first, and the court came to a decision, that Nujjumoonnissa was a *Sheah*, and that Shumsoonnissa as a *Soonee*, was not her legal heir, her own case would have been dismissed, while she succeeded as heir and representative of the other plaintiffs in the other two cases. Had the court held that Nujjumoonnissa was a *Soonee* and Shumsoonnissa was legally entitled under the rules of inheritance prevailing among that sect, to a six annas share of the property of the deceased, she would have succeeded in her own case, and the other two suits would have been dismissed, but with leave to institute a fresh suit for the remainder of the property. The order of this Court of 27th March 1857, when the suits were a second time remanded for trial, precluded the present principal sudder ameen from adopting this course, as it ruled, erroneously as we think, that there was then no further necessity for enquiry into the difference existing between the *Soonee* and *Sheah* sect, as to the course of inheritance, and the principal sudder ameen has, therefore, disposed of the three suits as one, governed by the law of inheritance prevailing among the *Soonees*. As these cases have been pending a long time, and we think that substantial justice can be given even in the form in which they have now come up to us, we think it advisable to proceed to a hearing, reserving to the Court's power hereafter, should it be necessary, to draw out an issue as to the sect of the deceased, and to require the lower court to take evidence on the point for our consideration, a course which it is urged by Baboo Ramapersaud Roy will be unnecessary, unless the Court concur with the principal sudder ameen in thinking that the suit of Kurumoonnissa is barred by her own act.

In the ikrar, or agreement, executed on 23rd July 1833 by the heirs of Hossein Ally, viz., Booh Ally, his nephew, Ashrufoonnissa, Woomdutoonnissa and Kurumoonnissa for herself, and as guardian of her two daughters, Shumsoonnissa and Nujjumoonnissa, it was provided that, out of the property left by Hossein Ally, his first wife, Ashrufoonnissa, should receive Rs. 1,15,000, and Woom-

dutoonnissa and Kurumoonnissa Rs. 7,500 each as dower; that Ashrufoonnissa should retain the sum of Rs. 6,000 found in her hands on the death of her husband, and the house in Sealda in which she resided, and some ground known by the name of Beesoo Bibi; that Woomdutoonnissa should also retain Rs. 2,000 and her house and some land; Kurumoonnissa should also retain Rs. 13,086 found in her possession, and her house in Sealda; and Booh Ally was to have certain orchard and other lands specified in the deed, and the remainder of the property was to be divided according to the "*Shurra*," and this was done by the arbitrators who partitioned the property among the heirs in conformity with the rules of inheritance prevailing among the *Soonees*. In 1842, Shumsoonnissa filed a suit to set aside the ikrar of July 1838, denying the claim of dower set up by the widows of Hossein Ally, and obtained a decree for her share of the property. Ashrufoonnissa appealed to this Court, but subsequently settled with Shumsoonnissa, and the appeal was withdrawn under a razeenamah. Woomdutoonnissa and Kurumoonnissa made no appeal, and consequently that decision became final in respect to the extent of Shumsoonnissa's share, and it is now urged that Woomdutoonnissa, having acquiesced in that decision, which declared the ikrar invalid, was estopped from pleading her right to dower in the present suit brought by Shumsoonnissa, as heir of Nujjumoonissa. We do not consider the absence of an appeal on her part in that case an estoppel to her pleading the same thing in the present case, though her silence cannot but be considered as strong evidence against her claim for dower. The evidence adduced by Ashrufoonnissa in proof of the execution of a kabinnamah by Hossein Ally, at the time of her marriage, appears to us unworthy of credit, and her allegation, as to its being made away with by Booh Ally, who got it from her, under pretence of shewing it to the judge of the 24-Pergunnahs, is unsupported by any reliable proof, and it is highly improbable, considering the ill-will then existing between them, that Ashrufoonnissa should have entrusted so important a document to his keeping for any purpose. We think, therefore, her claim to dower is unsupported by any credible evidence; but as Shumsoonnissa, in her replication in the present case has admitted, that a dower was fixed at Rs. 900, we think she is entitled to receive that sum. The claim of Woomdutoonnissa to dower appears to us equally untenable. In the decision come to by the principal sudder ameen in Kurumoonnissa's case, we think he has come to a right conclusion in holding that she is estopped by her own acts. In 1838, she for herself and as guardian for her children, admitted that the widows of Hossein Ally were entitled to dower, and signed an agreement to that effect, and she cannot now, as heir of her daughter Nujjumoonnissa, repudiate that act, which

she, in place of, and acting as her daughter, then performed, and deny their right which she then solemnly admitted. The amount of the share to which the widows of Hossein Ally, may thus obtain, will depend upon the fact of Nujjumoonnissa's sect. If she were a *Sheah*, the share of her property to which Kurumoonnissa would have been entitled, is eight annas, and to that extent her claim is barred; if Nujjumoonnissa died a *Soonee*, the right of Kurumoonnissa extends to a four anna share, and her claim will be barred accordingly.

As Woomdutoonnissa, who alone raised the question of the sect of the deceased, Nujjumoonnissa, has withdrawn her appeals, any decision as to the deceased belonging to the *Sheah* or *Soonee* sect is rendered unnecessary, and we, therefore, see no grounds for interfering with the judgment passed by the principal sudder ameen, who has divided the property according to the rules prevailing among the *Soonee* sect. We dismiss the appeals of Ashrufoonnissa and Shumsoonnissa, with costs.

THE 28TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH and H. V. BAYLEY, Esqs., Judges.

Regular appeals from the decision of Mr. W. S. Seton-Karr, Acting Judge of Jessore, dated 4th May 1858.

Case No. 381 of 1858.

Rajah Prosunnonath Roy Bahadoor, (Plaintiff,) *Appellant,*

versus

Kallykanth Roy and others, (Defendants,) *Respondents.*

Baboo Sreenath Dass and *Mr. W. Ritchie*, for appellant.

Baboos Bungsheebuddun Mitter and *Kishenkishore Ghose*, for respondents.

Case No. 388 of 1858.

Kallykanth Roy and Mallykanth and others, (Defendants,) *Appellants,*

versus

Rajah Prosunnonath Roy Bahadoor, (Plaintiff,) *Respondent.*

Baboos Bungsheebudden Mitter and *Dwarkanath Mitter*, for appellants.

Baboo Sreenath Dass and *Mr. W. Ritchie*, for respondents.

Suit laid at Company's Rupees 10,000.

Messrs. H. T. Raikes and H. V. Bayley.—PLAINTIFF sued in this case to eject the defendant from possession of the fishery of khal *Rochamara*, and for the cancellation of a mouroosee pottah set up by defendant, and dated 31st Srabun 1226. The suit was laid at rupees 10,000. Plaintiff alleged a title by mouroosee right to this khal, and stated that the fishery of it was let by his predecessor on a

Held, that as the plea of limitation was distinctly waived in the court below, it could not be heard in appeal from

the judgment of that court.

Held also, that under Section 12, Reg. I. of 1814, which was the law in force when defendant's pottah was executed, that document was admissible without being stamped, as a lease in lands paying revenue to Government.

Held thirdly, on the whole evidence and probabilities that the plaintiff had not shewn any valid ground in his appeal by submitting proofs of his title to justify interference with the order of the court below.

farming lease to the defendants; that when the estate was under the Court of Wards, during plaintiff's minority, this fishery was let by the collector in farm to the defendant from 1235 to 1250, and that it was only on the 20th Kartick 1251, about 6 months after plaintiff obtained his majority, that he learnt that defendants had set up an adverse mouroosee title, under the pottah of Srabun 1226, alleged by the defendants to have been given them by plaintiff's father. The plaintiff then avers that he was not allowed possession by defendants on his, plaintiff's majority in 1251, and proceeds to state, that defendants, subsequently, caused suits to be instituted by so-called ryots of theirs, and took the occasion of coming in as third parties, and of adducing the alleged mouroosee pottah of 1226; further, that although in some of these cases plaintiff's mother was made a party, she did not object, but that this may have arisen from intentional collusion, as the plaintiff and his mother were not on good terms, or may have occurred through the negligence of law agents. It is admitted, that from the date of the pottah of defendant of 31st Srabun 1226, up to the date of this suit, twelve years have elapsed, so as to affect plaintiff's claim under the general law of limitation, but the plaintiff pleads in his plaint, a right to sue within 60 years under Regulation II. of 1805, on the ground, that there had been fraud and violence on the part of the defendants.

The principal defendants, Kallykanth Roy and others, pleaded in answer, that the subject matter of this suit had already been decided by the Civil Courts in their favor, and that the plaintiff's present suit was consequently one, which under Section XVI. Regulation III. of 1793, could not be entertained; that the suit was barred by the general law of limitation, neither plaintiff's mother as guardian, nor any one, having sued in plaintiff's behalf to set aside the pottah of 1226, adduced by defendant in a case in which plaintiff's mother was a defendant, viz., No. 987, before the moonsiff of Sulkeah, and instituted on the 30th of Maugh 1241, whereas this suit was brought only on the 26th Chyet 1262, B. S. It was added, that as there was nothing to shew fraud or violence, plaintiff's plea of having a right to sue at any time within 60 years, was quite untenable; that in other cases, which had, from time to time, been instituted in regard to the fishery of the khal, the plaintiff's mother was made a defendant, but never objected.

Another defendant, Tarakanth Roy, pleads, that the plaintiff was a major, viz., 18 years old in 1249, and yet did not sue till 1262, and that the collusion of plaintiff's mother with the parties to the civil suits, on account of the enmity of plaintiff's mother to plaintiff was impossible, as plaintiff must have been then too young for such a cause of enmity to be in operation.

The other defendants, who are lessees under the principal defendant, pleaded limitation, and that when their original lease from 1238 to 1242 expired, they still continued as lessees in undisputed possession, and so remain.

The judge took up the case as an original suit, and recorded, on the 14th April, that the issue of limitation was withdrawn by the pleader of defendant, and that the plea of the suit being barred by Section XVI. Regulation 3 of 1793, did not apply, as no judicial opinion had been pronounced as to the validity of the pottah adduced by defendant, of 31st Srabun 1226. Proceeding to try the case on its merits, viz., the validity or otherwise of the mouroosee pottah of the 31st Srabun 1226, the judge held, that the pottah could not be admitted as evidence, as it was not stamped, and that the exemption pleaded by defendant, viz., that leases of actual cultivators were exempt from stamp, and that defendants were in the position of actual cultivators in regard to this fishery, was not one which could be allowed. The judge held, that defendants' possession as mouroosee-dars was evidenced by the absence of opposition in the proceedings of plaintiff's mother and guardian, a party to the suits in which defendants alleged by his mouroosee pottah of 1226, in adverse title to plaintiff's; that Savi, as farmer of turf Navol, in which the fishery was situated, gave defendant receipts for rent according to his mouroosee pottah, as from 1253 to 1256, being for a period after plaintiff attained his majority. The oral testimony of defendants' witnesses was considered by the judge to prove defendants' mouroosee pottah and by possession under it.

The judge held in conclusion, that even disallowing the defendants' main document, viz., the mouroosee pottah, on account of defect of stamp defendants' possession for a long series of years was proved on the record; while the plaintiff, although averring a dispossession in 1251, had not sued till 1262, to recover possession, and had then adduced in support of his suit only negative proof, strained inferences, and worthless oral evidence. The judge, accordingly, dismissed plaintiff's suit, without prejudice to his claim for rent from defendant. From this decision there are two appeals made to this Court. The one by plaintiff, urging that the defendant not having been able to file any mouroosee pottah, and having otherwise failed to prove any mouroosee title, must be held to be an ordinary farmer only; that the defendants had waived the plea of limitation, and that the judge's finding of long possession could not of itself suffice for a decree of a mouroosee right.

The defendants' appeal was against the judge's holding, that defendants' pottah was inadmissible, the plea in appeal being that as it had been filed in a previous suit, that gave defendant a right

to have it admitted; defendant further pleaded, that as the pottah of the fishery in suit was like one of an actual cultivator, it was under Regulation X. of 1829 exempt from stamp duty.

The first point to be considered in these appeals, is whether the plaintiff's suit is barred by the general law of limitation, if not, next, whether on a consideration of the case on its merits, the defendants' alleged pottah can be admitted unstamped, as contended in his appeal, and lastly, whether with, or without, the admission of the pottah, the judge's order dismissing the suit of plaintiff on an investigation and adjudication of the merits of the case as shewn by the evidence adduced on either part, is one with which we should interfere.

On the first point, viz., limitation, we have only to remark, that the pleaders of defendants' are clearly shewn by the judge's proceeding of the 14th April 1858, in which he decided the pleas in bar to have entirely waived this plea. It cannot, therefore, be taken up by us now in appeal here.

On the next point, viz., that the judge had wrongly held that the pottah could not be admitted as evidence without a stamp, we are of opinion that although under the exemption in Regulation X. of 1829, the lease not being one where the annual rents do not exceed 12 rupees or a government lease, or a pottah executed with an actual cultivator of the soil, could not be exempt (the defendants' own pleading shewing that he had sub-lessees and was not therefore an actual cultivator); still the deed being one of 1226 B. S., when Regulation. X. of 1829 did not exist, and Regulation I. of 1814 did, under Section 12, of which defendants' pottah as a lease of a tenant in land paying revenue to government would be exempt, the judge is incorrect in his ruling. The pottah of defendant is then in our view admissible as evidence.

This leads us to the third point, viz., whether the judge's decision on the merits is one, with which on a review of the whole evidence of both parties, we ought to interfere in this appeal.

We may premise by stating, that the plaintiff also in his plaint, claims on the averment of a mouroosee title, and puts in no evidence whatever of it, but this is of no importance, as the plaintiffs' proprietary right as zemindar does not seem to be denied in defendants' pleadings. On the one hand, then, the oral testimony to the execution of the defendants' pottah, which deed we have admitted as evidence, is vague and unsatisfactory, even making due allowance for the distant date at which it was executed. It is also apparent, that Poran Mundul, who is now shewn to have in certain suits admitted defendants' mouroosee title, did, in another, aver that title to be his own, and not defendants'. On the other hand it is quite clear, that plaintiff's mother and others were sued by Poran Mundul on account of dispossession of this fishery on the 16th of

January 1830, and that on the 24th December of that year, when Puran Mundul admitted defendant's mouroosee title, and the case was decided by a compromise to that effect, plaintiff's mother never opposed the proceeding. Plaintiff's plea is, that this was the result of negligence or collusion on the part of the law agent of plaintiff's mother. But no proof whatever is shewn by plaintiff in support of either supposition. Against it, is clearly proved by the evidence of Savi's naib, that *after* the termination of plaintiff's minority, Savi received rents from the defendants as holding the mouroosee lease of the fishery, and plaintiff never interfered. To rebut this, plaintiff urges that the farm was given to French and not to Savi. It is, however, shewn without contradiction, that Savi, not French, was the party really in possession as farmer. It is also clear, that although plaintiff alleges that possession was withheld from him by defendant in 1251, the year of his majority, he did not sue for eleven years after. Such are the independent facts upon the record against the plaintiff's case. To proceed to the proof, which the plaintiff does submit to the court, plaintiff puts in jumma wasil bakee papers, shewing that one Joynarain Mundul farmed the fishery for 3 years from 1224 B. S. The pottah of 1224 to Joynarain is put in, and an ikrar of koran, when the latter was sued by Joynarain claiming this fishery *then* as his own mouroosee, he not as now, contending that it was defendants'. Petitions are referred to of Gooroopershad Roy, father of one of the defendants, Gourkanth, dated 30th of Joyshto 1225 and 29th Jeyt 1232, speaking of defendants being farmers of the turf Navol, in which this fishery is situated, and not as mourooseedars of the fishery. It is argued for plaintiff, that if the fishery was held on a different tenure from the lease of the turf, the fact would have been specified. The plaintiff also argues, that as the lease of turf Navol, given on the 19th of Bhadro 1233, *and* an agreement with the collector, as Court of Wards, for the property in February 1830, do not make any deduction for the fishery of khal Rochamara, the presumption is, that it was not held under any separate mouroosee tenure, as pleaded by defendant. But in our opinion, these omissions in incidental papers, when in no case was the fishery now in suit and was not the actual matter of contest, do not amount to that legal proof by which the plaintiff is bound to support his case, especially when the defendant has clearly shewn on his part that when the fishery was the special subject matter of contention, and the defendant urged his mouroosee right, and plaintiff's mother was called up to contest it, she did not do so. The oral evidence adduced by plaintiff cannot, under such a state of facts, and under plaintiff's failure to prove his case by valid documentary evidence, be accepted as sufficient, and indeed the oral testimony on plaintiff's part is chiefly to possession and dispossession, in regard to which,

as before stated, we see that plaintiff alleging a dispossession in 1251, sues in 1262, a fact which may be fairly weighed in considering the probabilities of the truth of plaintiff's allegations.

On a review of the above circumstances, we do not think that the appellant, plaintiff, has shewn any valid grounds by submitting sufficient proof of his own title to justify our interfering with the order of the judge dismissing his suit. We accordingly reject this appeal with costs. The defendant, appellant, in No. 388, will get his costs.

Mr. G. Loch.—The whole case appears to me to rest on the validity or otherwise of the defendants' mouroosee pottah. He admits the plaintiff's superior title, and claims to hold the contested julkur on a pottah received from the plaintiff's ancestor, plaintiff therefore has nothing to prove. The judge did not admit the defendants' pottah, because it was written on unstamped paper, and had the defendants been contented with the decision come to by the judge, and his order regarding the pottah, this Court could not have looked at the pottah. But the defendant, dissatisfied with the judge's finding regarding his document, has appealed to the Court, and insisted upon a judgment being pronounced on its validity. Finding that the document is dated so far back as 1826, and that under the stamp laws then in force, no stamp was required for leases of this kind, the Court have admitted it as evidence, and it is the proof upon which, in my opinion, the plaintiff's case must stand or fall. If its execution be not proven, no collateral evidence will entitle the defendants to retain possession, if it be proven length of possession, and the other evidence adduced, may strengthen, but cannot be the basis of defendants' right.

As observed above, the judge did not admit the pottah as evidence, and therefore had to look to collateral proofs. Long and uninterrupted possession was in favor of defendants' claim, the delay in bringing this suit was also in defendant's favour. The suits instituted at various times in which plaintiff's mother and guardian was made a party, and in which defendant asserted his right, and gave publicity to his claim as mourooseedar, tended to favor the claim now set up, and looking only to these, we might have agreed with the lower court and considered that the plaintiff finding the julkur to be a profitable investment, had got up this stale claim to recover it from the possession of the defendants. But having admitted the defendants' pottah as evidence and basis of his claim, these attendant circumstances fall into the back ground, and in fact do not assist in supporting the defendants' case, unless we be satisfied with the genuineness of the document which the defendant has challenged the Court to pronounce upon, but which he would have shown more prudence by holding his tongue about.

Now what is the evidence to the execution of the pottah? There is actually none of any credibility. Two witnesses, neither of them

witnesses to the execution of the deed, depose, that they accompanied the defendants' ancestor in 1226 to the house of the plaintiff's ancestors, when the former went to get the mouroosee lease, one was at the entrance of the house, where the deed was executed, and the other was outside, and heard of its execution. The age of the deed even will not materially help the defendant in this case, for they acknowledge that they were in possession of the whole turruf as lessees from plaintiff's ancestors from 1224, and continued as such during the minority of the plaintiff under the Court of Wards, and they were doubtless in possession of this julkur as included in the turruf, and it is very singular as well as improbable, that they should select an insignificant stream, for which to obtain a mouroosee pottah and take such unusual steps to secure it, as is shown by their witnesses, who speak of their visit to the zemindar's house especially for the purpose. Lengthened possession, therefore, is, in this case, no proof of defendants' right. Defendants' possession of the julkur was quite compatible with their possession of the turruf, the julkur being comprised within their lease, and it is not improbable, that seeing the julkur increase in value as their tenure as lessees was about to expire, they set up this mouroosee title which they have endeavoured to support with a spurious document. The disputes which arose with different parties and resulted in suits in the civil court to which plaintiff's, mother as guardian for plaintiff, was made a party, and of which, for some reason best known to herself, she took little or no notice, cannot, in my opinion, be held fatal to the plaintiff's rights; nor can the receipts granted by Mr. Savi to the defendants subsequent to 1232, in which the defendants are styled mouroosedars, in any way affect his interest, as he cannot be held responsible for any document given without his knowledge and consent that might have passed between Savi, under-farmer from Mr. French, and the under-tenants, nor do the dakhilas from 1253 to 1256, though given in Savi's name, bear his signature, and it may be added, that the claims of third parties to hold this julkur as mouroosee in opposition to the defendants, tends to throw doubt on the reality of their tenures. As defendants have failed to prove their pottah, on which alone their claim can be upheld, I would reverse the order of the lower court, and give plaintiff a decree with costs.

THE 28TH FEBRUARY 1861.

C. B. TREVOR and C. STEER, ESQS., Judges.

Case No. 392 of 1859.

Regular appeal from the decision of Sreenath Biddyabagish, Principal Sudder Ameen of Backergunge, dated the 29th December 1858.

Mussamut Tarinee Dabia, guardian of Sushymookhee, minor, (Defendant,) *Appellant*,

versus

Mirza Hyder Ali and others, (Plaintiffs,) *Respondents*.

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit*, for appellant.

Baboos Ramapersaud Roy and *Gopal Lall Mitter*, for respondents.

Suit laid at Co.'s Rs. 12,535-15.

Held, that under construction 1129, any thing which has been determined by orders in execution in a former suit, and which was necessarily to be determined as being involved in the subject matter of the suit, and as being essential to any operative decree being passed upon it, must be held to be finally disposed of by the order in execution and cannot be made the ground of a new regular action.

Held in accordance with that principle, that when a *plaintiff* has been content to have a point necessary to the giving due effect to his decrees decided summarily in execution, and when that determination has eventually been against him, it is not competent *to him* to com-

PLAINTIFF, Mirza Mohamed Mehdee, son of Mirza Mohamed Ali, deceased, and others, sue Tarinee Dabia, widow of Kebul Kissen Roy, deceased, and mother of Woomacanth Roy, deceased, her minor adopted son and others, for a ½ share of the amount decreed in the Sudder Court's decree, dated 16th February 1848, to be realized from the property left by Kebul Kissen Roy, and the principal defendants, by the reversal of the miscellaneous order of the Sudder Court, dated 27th July 1850.

Plaintiffs allege that Kebul Kissen Roy, the husband of the defendant Tarinee Dabia, Kissen Bundoo Roy, and Dinnonath Roy, conjointly borrowed on 19th Cheyt 1229, the sum of Rs. 10,000, under a registered bond from Mirza Hyder Ali, father-in-law of Mirza Mohamed Khan, deceased, who is brother of one of the plaintiffs, Mirza Mohamed Mehdee, and ancestor of others; that after deducting the sums paid up to Cheyt 1240, both in the shape of principal and interest, a balance of 8,000 principal remained due; that Kebul Kissen Roy, one of the debtor's, and Mirza Hyder Ali, creditor, have deceased, Tarinee Dabia, the widow of Kebul Kissen Roy, in conjunction with Kissen Bundoo Roy and Dinnonath Roy, on the 19th Bysack 1241, took back the bond for 10,000 through Gokool Chunder Sein, gomashta of Mirza Fuzzul Ali, son of the aforenamed Mirza Hyder Ali, and executed a fresh bond for the remaining sum of Rs. 8,000 in favor of Mirza Fuzzul Ali, conditioning to pay the same on the 30th Cheyt 1242; that the obligors made no payment, that consequently the heirs of the original obligees sued the above named parties for the sum of 17,066-10-8 principal and interest, due under the bond executed by them, that the principal sudder ameen dismissed the claim, but it was eventually decreed to them in full by the Sudder Court on the 16th Ferbruary 1848; that in execution of the decree, certain landed properties were put up for sale in execution, that in the

meantime, on the death of Dinnonath Roy, judgment debtor, his widow, Joydoorga Dabia, succeeded him, and made payment amicably of ¼ of the amount decreed, and that consequently only the properties left by Kebul Kissen Roy and Kissen Bundoo Roy, judgment debtors, were put up to sale in satisfaction of the other ¾ share of the decree; that eventually the liability of Kissen Bundoo Roy, judgment debtor, to the extent of ¼ of the ¾ of the sum remaining due, was liquidated by his widow; that as to the property put up for sale to satisfy the ¼ share of the decree due by Tarinee Dabia, a petition of objection was put in by Ramkinkur Chuckerbutty, to the effect that Tarinee Dabia had adopted the defendant Woomacanth; and that the properties left by Kebul Kissen Roy, father of the minor, could not be sold in execution of the decree against Tarinee Dabia; that the judge rejected this petition, but that on appeal the Sudder Court in a summary order of the 27th July 1850, released the property, on the ground that the decision, in accordance with the prayer of the plaint in the suit, was a personal one against Tarinee Dabia; that as without a regular suit plaintiff can do nothing, they bring the present action to reverse the summary order of the court and to have the estate of Kebul Kissen Roy declared liable for the ¼ share of the decree decreed against Tarinee Dabia.

mence a fresh regular action for the reversal of the order in execution adverse to him, that order is final and conclusive.

The defendant, Tarinee Dabia, and Ramkinkur Chuckerbutty, on the part of her minor adopted son, Woomacanth Roy, in their several answers pleaded that after one suit has been brought and a decree obtained, a decree which in execution has been declared by the court to be a personal decree against Tarinee Dabia, it is not competent to the plaintiff under construction 1129, to bring a fresh regular suit to have the property of Kebul Kissen and his heirs declared liable to meet that personal decree. They then enter up several pleas also, to the effect that they are not liable for the amount claimed in the present suit.

The principal sudder ameen, for reasons which are not very intelligible, over-ruled the plea in bar urged by the defendants before him, and gave plaintiff a decree in the terms asked for by them, with all costs of suit.

From the decision of the principal sudder ameen an appeal has now been preferred by the defendants below, and they urge that under construction 1129, the present action is not tenable, as the case goes off upon the legal point, it is unnecessary to enter into other objections urged by the appellant, to the order of the lower court.

The plaintiffs in this case or their ancestors, it appears sued Tarinee Dabia as the widow of Keebul Kissen Roy, Kissen Bundoo Roy and Dinnonath Roy, for a sum due on a bond amounting to

Rs. 17,066-10-8; this suit was decreed in favor of the plaintiff on the 16th February* 1848, and the defence was declared by the court to be supported by nothing better than forgery, perjury, and fraud; it appears that the heirs of Kissen Bundoo Roy and Dinnonath Roy, severally paid to the plaintiff their one-third liability under the decree, and that in execution of the decree against Tarinee Dabia certain properties belonging to her husband Kebul Kissen Roy were attached and lotted for sale; that on an objection to its sale being made by a party on behalf of a minor adopted son of his, the judge of the zillah court disallowed the objections, but on summary appeal this court on the 27th July 1850 ordered the property to be released, the order of this court is to the following effect:—"Whereas it appears from the original plaint and the decision passed in this case, that the suit of the decreeholders, plaintiffs, was instituted only against Tarinee Dabia, widow of Kebul Kissen Roy, and as in the said plaint it is prayed, that the amount sued for be awarded against the defendant, the purport of the decree cannot be held to be contrary to that of the plaint. Under such circumstances the execution of decree against the estate of Kebul Kissen Roy and the realization of the decretal amount from his effects are contrary to law and the practice of the court, hence the order of the judge is liable to reversal, and it is reversed accordingly."

* See Decision for 1848, pages 84-94.

For the reversal of this order and for a declaration by this court, in opposition to the order passed in execution, that the estate of Kebul Kissen Roy is, under the decree of February 1848, liable for the ⅓ share of the decree which passed against Tarinee Dabia, the present suit is brought, and the question is whether under the circumstances just detailed it is tenable or not.

"The principle embodied in construction 1129, (to use the words of the Court in the case of *Ramchunder Acharj Chowdree and others, *versus* Issurchunder Acharj Chowdree) is one which, independently of its being expressed explicitly in any particular form, must implicitly be followed and adopted by any system of legal procedure laying the least claim to clearness and certainty; it is this, that when a court has determined in execution the meaning of its own decree, no other court of merely concurrent jurisdiction has any power to interfere, the interpretation put upon its own decree by the court which passed it is, subject only in cases admitting of it to a summary appeal, final and conclusive."

* Decisions for 1857, pages 859-862.

In the case of Maharajah Keerut Sing *versus* *Mussumut Ranee Sreemuttee, the Court enunciated the principle in the following terms, "any thing which has been determined by order in execution in a former suit, and which was necessarily to be determined as being involved in the subject matter in the suit,

* Decisions for 1853, pages 521-525.

"and as being essential to any operative decree being passed upon "it, must be held to be finally disposed of by the order in execution, "and cannot be made the grounds of a new regular action."

Now applying this principle to the present case, we find that the plaintiff obtained a decree in execution, in the presence of the parties concerned, this court determined judicially that as the prayer of the plaint was only against Tarinee Dabia personally, the decision of this court must be construed in accordance with the prayer of the plaint; that consequently, the decree was only a personal one against Tarinee Dabia, in other words it determined judicially a point which was necessary to be determined as being involved in the subject matter of the suit, and as being essential to an operative decree being passed upon it, it follows that the point must be considered finally disposed of by the order in execution and cannot form the ground of a new suit. Moreover, the circumstances of the case last cited are altogether analogous to those of the present, in that case the plaintiff sued for possession of certain villages usselee and dakhili without specification of the names or number of the dakhilee villages; in execution the plaintiff applied for possession of seven dakhilee villages. The judge admitted the plaintiff's claim, but the judges of this court, who had passed the original decree on appeal, reversed the judge's order, confining the decree to one dakhili village. The plaintiff then brought a fresh suit for six villages which had been held to be not the dakhili of Jynuggur, belonging to the plaintiff, but nizamut villages of a separate estate, Talook Soopa, belonging to the defendant. This court then held, after enunciating the principle above cited, "that the first decision was "in plaintiff's favor, and he did not appeal against it as being "insufficient by reason of its not containing an award regarding "the exact number and names of the villages to be made over to "him. *He was content to bring that matter forward in execution and "to have it decided in that more summary mode of procedure.* The "decision was indispensable to the giving due effect to the decree, "and the court having omitted from whatever cause to notice the "point in the regular enquiry before passing a judgment, was "bound to consider and settle it, as it arose in execution. *The "plaintiff, having been assenting to such a disposal of the controversy "respecting the villages of which he was to obtain possession, cannot "be allowed to commence a new litigation by a fresh regular action, "because the determination was against him.*"

Looking then to the principle involved in construction 1129 and to the application of that principle in a case analogous to the present, we are clearly of opinion that the plaintiff's present action is not tenable, it is unnecessary for us to detail on the inconvenience which would result were plaintiffs allowed to supplement the defect

of one decree by a fresh suit on the same cause of action, it is for the interest of all parties that litigation once commenced should be in one suit finally completed, and if a party, as the plaintiffs have done in the present case, and as the plaintiffs, in the case before this court in 1853, did allow a point essential to be determined summarily in execution instead of having it cleared up by petition for explanation or a correction of the terms of its decree, to the court passing the decree, he must bear the penalty of his own negligence or want of diligence, and not ask the court to infringe an important principle merely because his own may fall within the category of hard cases.

The court regret the result at which it has been compelled to arrive in the present case, as it appears from the decision of the court above alluded to, of the 16th February 1848, that the defendant, appellant, Tarinee Dabia, has opposed the plaintiffs' claim from the beginning, to use the words of this court, by forgery, perjury and fraud, and as, from that decision there is good ground for doubting whether the construction put upon it by the judge in the miscellaneous department in 1857 is the correct one.

Under the view of the whole case expressed above, we decree the appeal, and reverse the order of the court below, with costs.

THE 28TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH and H. V. BAYLEY, Esqs., Judges.

Regular appeals from the decision of Mr. E. Lautour, Judge of 24-Pergunnahs, dated the 12th May 1858.

Case No. 415 of 1858.

Nuzzur Mahomed, Ghatmanjee, and Azim Serang, (Plaintiffs,) *Appellants,*

versus

Mr. John Kerr and others, (Defendants,) *Respondents.*

Moonshee Ameer Ally and *Baboo Sumbhoonath Pundit*, for appellants.

Baboos Kishenkishore Ghose and *Ramapersaud Roy*, for respondents.

Case No. 416 of 1858.

Mr. John Kerr, one of the (Defendants,) *Appellants,*

versus

Nuzzur Mahomed, Ghatmanjee and Azim Serang, (Plaintiffs,) and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Chundernath Chatterjee* and *Messrs. R. T. Allan* and *R. V. Doyne*, for appellant.

Moonshee Ameer Ally and *Baboos Sumbhoonath Pundit* and *Ramapersaud Roy*, for respondents.

Suit laid at Co.'s Rs. 23,572-2.

The judge's judgment upheld upon

THESE are cross appeals in a suit instituted by Nuzzur Mahomed and another, grantees of lot No. 60, in the Soonderbunds, claiming

to recover from the defendant, Mr. Kerr, the grantor, of lot No. 56, a strip of land comprising some 3,500 and odd beegahs of land, belonging to lot 60, which it is alleged, the defendant had incorporated within his own grant, lot 56, by procuring a wrong demarcation of the boundary line, forming respectively the north and south boundary of the two lots in question. the facts proven.

The statement of the plaintiff is, that he procured from the government in 1844, a pottah of lot 60, just then resumed from the old grantee, Mr. Douglas, who had failed to perform the conditions upon which his pottah was held, and soon after taking possession, plaintiff found himself opposed by Mr. Kerr, the proprietor of the neighbouring lot No. 56, who had run the northern boundary of his grant from the Arrah Bunkha khal at its junction with the Tumbooldoho river in a north-easterly direction, to the Pinna river at its junction with the Gungachuren khal, thus depriving plaintiff of a large slice of his lot, amounting to 3,379 beegahs, 14 cottahs, and 4 chuttacks of land; that plaintiff's southern boundary as recorded in his pottah was specifically described as running from the Tumbooldoho river, at its junction with the Arrah Bankha khal *due east* to the Pinna river, and that as a line so drawn, would include the land now sued for, plaintiff applied to the Revenue Authorities to reinstate him in his rights, but although some proceedings were initiated by those authorities with that object, and surveys held, and maps prepared, the Revenue Authorities ultimately refused to interfere with the boundary line claimed by Mr. Kerr, and plaintiff, therefore, commenced this suit to establish his rights.

The defendant, Mr. Kerr, asserted that he was entitled to hold the land as comprised within the boundaries of his pottah granted to him in the year 1840; that in that year the boundary line now contested was mapped by survey and demarcated by Mr. Turner, who proceeded to the spot for the purpose, and that subsequently when this line was disputed by the plaintiff, Mr. Mullins and Mr. Gomes both located the boundary line in their maps as claimed by the defendant, and the Revenue Authorities ultimately confirmed him in the possession of it, and plaintiff had agreed to its correctness.

The judge has decided in plaintiffs' favour, holding that the boundaries of plaintiffs' pottah clearly bring the disputed land within lot No. 60, inasmuch as the southern boundary is constituted by drawing a line *due east* from the mouth of Arrah Bunkha khal to the Pinna nuddee on the west, and the northern boundary of the defendants' grant, which should correspond with the southern boundary of the plaintiff, is described in defendants' pottah to be a line from the Tumbooldoho river due east, to the

Pinna river on the west, where a small khal joins, and as the lands in dispute can only be included in defendants' lot by maintaining the boundary line set up by him, which runs from the Arrah Bunkha khal to the Pinna, in a *north-easterly* direction, the judge concluded that defendant was not entitled to such a direction in his boundary line, and he accordingly directed that one should be made by the Revenue Authorities, further south and running due east and west from the Arrah Bunkha khal, and decreed possession of the disputed lands to the plaintiff. The judge, however, held, that as there was a question to be decided relative to the sum defendant should receive, as costs of the improvements he had made by cultivating the lands hitherto held by him, the wassilat received by him should be kept in lieu of any charge on the other account, and that moreover, the defendant should hold on as abadkar at a rent of 4 annas per beegah in excess of government revenue for the lands under cultivation.

From this decision both parties have appealed, the plaintiffs, to get rid of the incumbrance imposed upon them by the judge, in allowing Mr. Kerr to remain in possession as abadkar, and the defendants, upon the general question of the propriety of the judge's decree relative to the boundary line laid down by him. We propose, first, to enquire into the propriety of the judge's decision on the boundary line.

It is admitted by the pleaders, that the pottahs of each party have their respective boundaries recorded, and that the only one in dispute is, that which divides the two grants to the south and north respectively.

On this point we observe, that the plaintiff's pottah describes the southern boundary of lot No. 60, to be "a line running due east and west from the mouth of the Arrah Bunkha khal." We also observe, that the western boundary is the Tumbooldoho river, and the eastern is formed by the Pinna nuddee, consequently, as the Arrah Bunkha khal flows out of the Tumbooldoho river, the junction of these two streams is the point on the west, from which the south boundary will start, and by continuing it due east to the Pinna river, the south boundary line of lot 60, must be correctly defined. Now our first object was to ascertain if a boundary line thus drawn upon the south of lot 60, would correspond or interfere with the northern boundary of lot No. 56, belonging to the defendant. In the defendants' pottah the western boundary is likewise described as the Tumbooldoho river, and the eastern as the Pinna nuddee, and the northern side is a line running from the Tumbooldoho on the west to the Pinna nuddee on the east, to a spot where a small khal runs into the latter. Now, it is evident, that while plaintiff's southern boundary line commences to run from the Tumbooldoho

due *east* at the point where that river is joined by the Arrah Bankha khal, no landmark whatever is given as a starting point to define the spot on the Tumbooldoho river, from whence the defendants' northern boundary may be drawn, neither is there any landmark, save some nameless khal in the Pinna nuddee on the east, which the northern boundary is to meet, and consequently if the Arrah Bankha khal be taken as the furthest point south to which the plaintiff can go, it follows, that the Arrah Bankha khal must also to the furthest point north to which the defendant can go to take a start for his northern boundary, and as both the north line of the defendant and the south line of the plaintiff must run due east to meet the Pinna nuddee in that direction, it follows that neither party have any right to deviate north or south of such straight line as may be run from Arrah Bankha khal, and therefore, a line, as ordered by the judge, to be demarcated as the divisional line of the two lots, would appear to be the line which their respective pottahs contemplate. Now setting aside the maps of Hodges and Prinsep, made at a time when the jungle was too thick and impervious to allow of any but an imaginary boundary line being recorded between these two lots, we have the maps of Turner, Mullins, and Gomes upon which the line, now disputed, is delineated, and we are fully able to judge from them, whether the line from the Arrah Bankha khal on the west has been drawn due east to the Pinna nuddee, or, as stated by the plaintiff, in a north-easterly direction, and consequently so as to enlarge the boundary of the defendant at the expense of the plaintiff's rights, and we find that the line recorded on these maps, instead of meeting at right angles, a line drawn from north to south, which would be the case, if run due east and west, severs such line at an acute angle diverging considerably to the north-east. Such line then would appear to be opposed to the boundary line laid down in the pottahs of *both parties;* but the defendant supports its validity on the following grounds. In the first place his pleader informs us, that after the grant of the lot No. 56, a dispute arose between Mr. Kerr, the defendant, and his co-sharers, Messrs. Hills and Turner, and a survey of the lot (it is supposed in accordance with Hodges' map) was effected by Mr. Turner, and the lot measured, bounded, and divided amongst them. In this map the northern boundary is made to run from the mouth of the Arrah Bankha khal in the Tumbooldoho river on the west to the junction of the Gungachuren with the Pinna nuddee on the east, and this line, the pleader assumes, is in accordance with the pottah, the Gungachuren being the khal at which point the pottah describes the northern boundary as cutting the Pinna nuddee. The pleader, moreover, argues, that when that boundary line was so demarcated,

the present plaintiff was in the service of Mr. Kerr, and himself pointed it out as the boundary of his master's lot. That again, when the plaintiff raised the present dispute in 1847, a survey was directed by the Board and conducted by Mr. Mullins, who adhered to the boundary line laid down by Turner, and as plaintiff was still dissatisfied, another surveyor, Mr. Gomes, was subsequently deputed, who ultimately confirmed the same line as the divisional boundary between their respective lots.

Now with regard to these several proceedings and surveys, we agree with the judge that they are altogether inconclusive to establish any thing against the plaintiff.

The first survey by Turner, was admittedly intended to settle disputes amongst the shareholders of lot 56, and if with that object in view, a wrong boundary line was demarcated as the northern limit of the lot, it cannot possibly affect the rights of parties other than those interested in that dispute. Any boundary line then drawn between lot No. 56 and No. 60, was at any time open to question by the proprietor of the latter allotment, who was in no respect interested in the matter then pending, and who had no notice of the proceedings then taking place. As to the fact of the plaintiff being at the time in the service of Mr. Kerr, and cognizant of all that took place, we see nothing in that to stop him from asserting his rights in the position he subsequently acquired as proprietor of lot 60. Then as to the surveys of both Mullins and Gomes, it is quite clear, that they merely traced out and adopted the survey of Mr. Turner, and when Gomes attempted to take some independent action in the matter, and to deviate from his predecessor's views, he was directed by the Board of Revenue to make no alteration in the boundary line claimed by Mr. Kerr, and consequently merely traced out that which Turner had in the first place originated. These surveys, therefore, from Turner downward, so far as they relate to this boundary line, were identical, and plaintiff can no more be bound by the later surveys than by the first admittedly proposed and conducted for the sole object of settling a dispute *within* the boundaries of lot No. 56, and which has sole reference to the interests of the co-sharers of that lot.

As to the Gungachuren being the khal flowing out of the Pinna nuddee to which the defendant's pottah alludes as a landmark for his northern boundary, we see no ground, whatever, for any such assertion. The Gungachuren was in all probability both existing and named, when the pottah was originally drawn up, and would doubtless have been indicated by its own name, had it been the real point of junction for the northern line, whereas only a khal is mentioned, which must then have been

represented by one of the nameless insignificant khal, apparently a boundary in the eastern side of the defendants' grant. Although not a matter of very great importance in estimating the relative rights of neighbouring grantees to lands in dispute between them, yet in the present case we are shewn that plaintiff's grant was estimated as containing 8,900 beegahs of land, and recent measurements have proved that he only got possession of some 5,500 beegahs, and therefore the addition of the quantity of lands now claimed, that is to say, about 3,300 and odd beegahs, will scarcely make up the full quantity he is entitled to hold by the conditions of his potttah. Whereas the defendant has, under a dowl, granted to him in 1854, some 13,640 beeghas by measurement, showing a large quantity of land to be in his possession in excess of the 8,300 beeghas estimated as the area of his lot, when originally granted, and though, as remarked above, we do not consider this fact, if standing alone, to be a very material point upon which to ground any conclusions: it is something in plaintiff's favour to shew that the acquisition of the land in suit will not make him a larger holder of lands than his pottah entitled him to possess. All the facts, therefore, established in this case seem to us to confirm the validity of the judge's finding, as to the right of plaintiffs to hold the lands sued for by demarcating the boundary line as proposed by the judge.

There is still a point of law to be disposed of, which was raised before us by Mr. Allan as to the right of plaintiff to maintain this action on the face of certain acts and proceedings of the government officers, which Mr. Allan argued, were sufficient to prevent the government itself from interfering with the lands and boundaries as proposed by Mr. Kerr, and were, therefore, equally effective in estopping the plaintiff as the government lessee from doing so.

It is alleged that as the government granted to Mr. Kerr a pottah of lot 56 in 1840, and the government officers have, upon the different occasions adverted to above, defined the northern boundary of the grant through the medium of its own officers, and has, moreover, through the proceedings of its revenue officers, upheld and confirmed the boundary line claimed by Mr. Kerr in opposition to the plaintiff, and as late as 1854 has recorded the dowl of that year as entitling Mr. Kerr to the entire quantity of lands entered therein; the government could not, after a series of acts confirmatory of Mr. Kerr's rights and possession, turn round and claim to oust him from any of the advantages thus secured to him, neither can the plaintiff, its lessee, and one deriving title from government itself raise any question, which the government could not, and in fact that the acts of the government officers in favour

of Mr. Kerr, are one and all, binding upon the plaintiff as government lessee, and stop him from prosecuting this claim in the courts of law. But it appears to us that there are no facts upon which to base this theory of law. The government granted a pottah to Mr. Kerr in 1840, and another to the plaintiff in 1844. Now it must be evident that at the latter date, the government divested itself of all rights as lessor in favour of the plaintiff, and therefore any acts done by the government officers, which may be inferred to have had an injurious effect upon the plaintiff's rights could not be in any respect binding upon the plaintiffs. The surveys, therefore, conducted by orders of the government officers subsequent to 1844, and the proceedings of the Board and subordinate Revenue officers, however opposed to a recognition of plaintiff's rights, cannot operate so as to prevent his prosecuting those rights in any shape he may have deemed necessary, and it only remains to consider the nature of the government proceedings before 1844, which are confined to the survey of Mr. Turner in the dispute beetween the co-sharers when the disputed boundary was run in 1840. Now at that time lot No. 60 was the property, not of government, but of Mr. Douglas, whose rights were resumed in 1844.

It has been argued by Mr. Allan, that the subsequent acts of the government, in strictly upholding that boundary line is evidence, of its intention to waive or ignore any other rights, and therefore the government voluntarily made over to Mr. Kerr all the lands within his contested boundary. But we cannot infer any such intention upon such inconclusive data. There could at that time have been any intention on the part of the government to encroach upon Mr. Douglas' grant, now represented as lot No. 60, in this case. The grant was then the property of Mr. Douglas, and not within the grasp of the government, and if the government had intended to enlarge the boundary of Mr. Kerr at the expense of the neighbouring grant, some alteration in the existing boundary life between the lots would undoubtedly have been made and recorded, and the pottah granted to plaintiff after resumption of Mr. Douglas' rights would not have contained precisely the same original boundaries defined in the time of Mr. Douglas' occupancy. It is clear to us, then, that the demarcation of the northern boundary by Turner in the dispute between the co-sharers was a mere accident, and that no intention, binding upon the government in the matter, can be inferred from that survey. Government, therefore, was perfectly at liberty to grant the lot No. 60 in all its integrity, and we have no doubt it was so granted to the plaintiff.

Seeing nothing then in this appeal to warrant our interference with the judge's order, regarding the boundary line in dispute, we confirm that part of the judgment.

On the appeal of the plaintiff regarding that part of the judge's decision which retains Mr. Kerr in possession of the lands sued for, on a hereditary and transferable title at a rate of 4 annas per beegah in excess of the government revenue, we have only to observe, that as this part of the judgment appears arbitrary and unjust, we cannot uphold it. Mr. Kerr can have no rights whatever conceded to him within the limits of the plaintiff's pottah; but he must be left to make any arrangement he can with the grantee. The plaintiff is entitled to have the lot free of any such incumbrance as the judge has imposed upon.

The claim of wassilat has been abandoned in this appeal, the plaintiffs are entitled to their costs in both appeals.

THE 28TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, ESQS., Judges.

Case No. 418 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Judge of Jessore, dated 14th May 1858.

Rajah Prosonnonath Roy Bahadoor, (Plaintiff,) *Appellant,*

versus

Rajah Pertap Chunder Sing and others, (Defendants,) *Respondents.*

Baboo Sreenath Doss and *Mr. W. Ritchie*, for appellant.

Mr. R. T. Allan and *Baboo Ramapersaud Roy*, for respondents.

Suit laid at Co.'s Rs. 32,094-10-9.

Suit dismissed, as the evidence in support of the plaintiff's claim as to the alleged boundary was held to be unworthy of credit.

THE plaintiff sues to recover possession of certain lands appertaining to his village of Ujgram and Bhabothia, from which, he alleges, he has been ejected by the orders of the magistrate of 31st July 1840, confirmed by the session judge on the 7th September of the same year, and by further orders of the same authorities of 5th and 29th July 1841.

The defendants claim the lands as appertaining to their village of Satokhalla, and the judge has dismissed the suit for want of proof.

The plaintiff avers that the southern boundary of his village of Ujgram is a straight embankment "tana ayl", which joins the two ends of a bend in a khal known by the name of Gung Nullya. This khal was in existence in 1802, (though then partly dried up) for it is shewn in the map of an ameen, who was deputed that year to determine the boundary between the two villages in a suit brought in the register's court by the ryots of Satokhalla against those of Ujgram; and then the boundary between the two villages was declared and fixed to be the "tana

ayl" to the north of Gung Nullya khal. The ameen's map, besides tracing the course of the Gung Nullya, recorded the names of the ryots of either village, who occupied lands in the vicinity of the khal, and thus the names of Debeepershad, Rampershad, Mohesh Lahoree, are found to be in possession of the lands immediately to the south of the khal.

The original ayl and khal are now no longer traceable, but plaintiff points to certain low lands, which he avers to have once been the khal, and urges, that if his evidence be sufficient to establish this point, there can be no difficulty in determining the position of the "tana ayl," which is at the distance of one russy to the north of the Gung Nullya khal. In support of his assertion he refers to the decision of the magistrate in a case under Act IV. of 1840, bearing date 31st July 1840, and affirmed by the session judge on 7th September following. In this case the thanna jemadar had been deputed to make a map of the lands in dispute. This map shews a khal running east and west, and to the north of it some high uneven land called "Dadurea." This khal, it is alleged by plaintiff, is not the Gung Nullya, but Kutai Khal, dug very recently by the zemindar of Nuldee, and that the real Gung Nullya lay further to the south. The magistrate held, that the Gung Nullya was ten russees south from the Dadurea land, and the "tana ayl," to the north of it was the boundary between the villages. The judge, in affirming this award, directed plaintiffs to be put in possession of the land up to the "tana ayl," which was one russy to the north of the jaree, or flowing Gung Nullya. The use of the word "jaree," has, it is alleged by plaintiff, caused all the present confusion, for the real Gung Nullya was dried up at that time, and was only traceable by the land being very low, so that when the darogah went to the spot to give possession, he reported on 15th April 1841, that he could not find any other flowing khal than what the plaintiff called the Kutai khal; that he did not think this to be the Gung Nullya, for he could trace no "tana ayl" to the north of it, while the distance from what plaintiff called the Dadurea to certain low ground, which plaintiff pointed out as the site of Gung Nullya, was about eight or ten russees, as laid down in the award under Act IV. 1840, and that to the south of this, certain lands were pointed out by the descendants of Debeepershad and Rampershad, as the lands occupied by their ancestors. He concluded, therefore, that the low lands were the original Gung Nullya, to the north of which an ayl might here and there be traced. The magistrate, for reasons assigned in his proceeding of 5th July 1841, held the khal shewn in the jemadar's and darogah's maps to be the real Gung Nullya, though called by the plaintiff, the Kutai khal, and he ordered a fresh embankment to be raised east and west at

a distance of one russy to the north of the said khal to mark the boundary between the two villages, and reported his proceedings to the judge, who confirmed them on 29th idem, and it is to reverse this order, and to set aside this boundary that plaintiff, after the expiry of nearly twelve years from attaining majority, has now come into court.

The only evidence, therefore, in support of his claim, besides a number of witnesses of the usual kind and credibility that plaintiff can produce, is the map of the darogah prepared in April 1841, and he asks the court on the strength of that map, unsupported by any credible evidence, to eject the defendant from possession which he has certainly held undisturbed for a period of sixteen years before the present suit was instituted. Whenever a stale claim is advanced, and the present is nearly as stale a one as could be made, the court invariably make it a rule to require very strong proof from the party seeking the assistance of the court to oust another, and in this case, there is absolutely none of any credibility. We, therefore, dismiss the appeal with costs.

THE 28TH FEBRUARY 1861.

H. T. RAIKES, G. LOCH and H. V. BAYLEY, Esqs., Judges.

Case No. 448 of 1858.

Regular appeal from the decision of Moonshee Nazirooddeen Khan, Bahadoor, Principal Sudder Ameen of Behar, dated the 30th June 1858.

Brejololl Oopadya, (Plaintiff,) *Appellant,*

versus

Maharanee Indurjeet Kowar and others, (Defendants,) *Respondents.*

Baboos Ramapersaud Roy, Kishenkishore Ghose, and *Unnodapershaud Banerjee,* for appellant.

Moonshee Ameer Allee, Baboo Sumbhoonath Pundit, and *Mr. R. T. Allan,* for respondents.

Suit laid at Company's Rupees 27,000.

THIS suit was instituted to cancel a sale of property in execution of a decree of court.

The property is situated in Behar and consists of a zur-i-peshgee lease granted to Brejololl and another of 8 annas of certain villages as security for the interest of a sum of money amounting to 1,57,000 rupees, which Brejololl and Bechunloll had advanced to the proprietor of the villages.

The Benares court, having passed a money decree against Brejololl, the creditor sued out execution of the judgment and procured an order for the attachment and sale of Brejololl's rights

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Held also, that the sale so made of the debt and security was not a sale of personalty only, but a sale of an interest in land as contemplated by Section 3, Act IV. of 1846, and subject to the rules which govern sales of landed property.

and interests in the debt above mentioned. This order was transmitted by the Benares court to the principal sudder ameen of Behar for execution, who advertised for sale the rights and interests of Brejololl in the money advanced by him and Bechunloll, and also any interests accruing to the former in the zur-i-peshgee lease, by which the interest of the debt was secured, and the Behar court sold the same, treating the sale as one of personalty, and requiring immediate payment of the purchase money from the purchaser.

The objections taken against the validity of the sale are, first, that the order, transmitted, only required the sale of Brejololl's interests in the principal debt, and made no mention of the zur-i-peshgee lease, which was added by the Behar court. 2nd, that as the sale included the lease, it was a sale of *an interest* in land and not personalty, and the forms, which govern a sale of lands, should therefore have been followed, and fifteen days' grace should have been allowed for the payment of the full purchase money, whereas the amount bid was immediately demanded, and this resulted in the default of the first purchaser, who was not prepared to pay up the amount bid by him, and the instant re-sale of the lot, which, in consequence of the immediate demand of the money, only realized the small amount of 27,000 rupees; and 3rd, that the amount of the decree was overstated in the advertisement of sale to the extent of 55 rupees, which amount had been realized and remitted to the Benares court, previous to the issue of the advertisement, and such informality has been held by this court in recent decisions to vitiate sales in execution of decrees.

The lower court has dismissed the suit, holding that the sale was properly held as for personalty; the sale of zur-i-peshgee leases in execution of decrees having been so held invariably in the Behar district, and that the excess of 55 rupees was not in itself such a material defect as could invalidate the sale.

There are no disputed facts in this case.

The question is, whether, as argued for the appellant, the sale should have been in the form prescribed for sales of real property, or was rightly treated by the civil court as a sale of personalty, and whether the defect, pleaded, is sufficient to invalidate the sale.

The sale took place on the 20th of December 1851, and we are shown the advertisement of sale wherein the rights and interests of the debtor, both in the debt due to him and in the *villages* covered by the zur-i-peshgee lease, are advertised for sale. It is agreed by the appellant's pleader, that as the rights and interests of the debtor in the villages leased to him were a part of the sale, those interests were an *interest in land*, and as Section 3, Act IV of 1846, enacts that "in the territories subject to the presidency of

Fort William in Bengal, except the north-west provinces, attachments and sales of land, or of *any interest in land*, in satisfaction of the decrees or other process of the courts of civil judicature shall be made by such courts, or under their directions, and that the rules, now in force for the attachment of sale of such real property as the court of civil judicature are now authorized to sell in satisfaction of decrees without application to the revenue authorities, shall apply to attachments and sales made under authority of this Act." That conformably to the provisions of the law as above given, as a zur-i-peshgee lease has been held by our courts to be equivalent to a mortgage of the lands leased, and a mortgage constitutes a recognized interest in the lands covered by it, so a zur-i-peshgee lease must be considered to do the same, and consequently is such an "interest in land" as the Act contemplates, and can only be sold in conformity with the rules applicable to the sale of real property by the courts of civil judicature. That the rules regarding the sales of real property differ from those which govern the sales of personal property, in the essential point of allowing a period of fifteen days between the day of sale and date of full payment, and as the price obtained in the present instance was small in relation to the value of the property disposed of, the defect in procedure has acted to the detriment of the appellant, and justifies his claim to have the sale set aside. Now, with reference to the above argument it appears to us, that as the thing intended to be sold was the debt due by the lessor of the villages to Brejololl, the purchaser of that debt at the sale, was entitled to get any collateral security, which Brejololl himself held, that is to say, that Brejololl had no right to hold a lien on the property when he ceased to be the creditor of the lessor, but that the lease, as part of the debt transaction, must continue to be the available security of the person to whom the debt was due. Whether the lease, therefore, be advertised in the sale advertisement, or the advertisement be confined to a description of the debt as due to the judgment debtor, the purchaser must, as a general rule, be entitled to the lien, which the judgment debtor of the decree had held. In the present instance, Brejololl, the judgment debtor of the decree, had been put in possession of the villages as lessee in satisfaction of the security he was entitled to hold, and as it was the intention of the court to sell the interests thus acquired by Brejololl, and to transfer to the purchaser the exact interests held by him, it is only fair to presume that the court intended to guarantee to the purchaser, not only the rights of Brejololl, quoad the debt due to him, but also the possession of the villages as lessee, as held by Brejololl at the time of sale. With this object only could the names of the villages and the exact interest held therein by Brejololl, be declared, as they were declared in the notice of sale.

Under these circumstances, we think there can be no doubt that Brejololl did, at the time of sale, hold an *interest* in these villages, equivalent to that of a mortgagee, and that this interest amounted to all the proprietary right held by the lessor, subject only to the right of redemption reserved to that party. Such an interest as this, cannot, in our opinion, fail to be of the nature contemplated by Act IV. of 1846, Section III; and the sale should, therefore, have been conducted in accordance with the rules applicable to the sales of real property.

It is not denied that in the instance of this sale, those rules were not followed, and as there are precedents of this court wherein a departure from those rules in sales of this nature has been held to be fatal to the validity of the sale, we must follow them on the present occasion, and set aside this sale. As the sale is cancelled on the ground above given, it is unnecessary to enter upon the consideration as to the grounds pleaded in appeal.

The appeal is, therefore, decreed with costs of both courts in favor of the appellant.

THE 28TH FEBRUARY 1861.

H. T. RAIKES, H. V. BAYLEY and C. STEER, Esqs., Judges.

Case No. 464 of 1858.

Regular appeal from the decision of Mr. G. P. Leycester, Judge of Midnapore, dated the 7th June 1858.

Chowdhree Lukheenarain Dass Mahapatur, (one of the Defendants,) *Appellant*,

versus

Mussamut Sabitra Debea and others, (Plaintiffs,) and others, (Defendants,) *Respondents*.

Mr. R. T. Allan and *Baboo Ramapersaud Roy*, for appellant.

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit*, for respondent.

Suit laid at Company's Rupees 9,129-8-3-2.

Held on a plea that full consideration had not passed, and that usurious interest and discount had been charged; that this plea was not proved. Plaintiff's appeal was, accordingly, dismissed and the judgment of

THE decision of the judge of Midnapore, against which the appeal now made, is brought before us, has been passed in consequence of the judgment of this Court of the 30th March 1857, page 482, remanding the case.

The suit was for possession of land, with mesne profits, and interest from date of foreclosure to date of possession, and was laid at 9,129-8-3-2

In the judgment of this Court before cited, the pleadings are given at length, so that it is necessary to state in this place, only the prominent points of contention, now before us.

the lower court affirmed.

The plaintiff's allegation was, that defendant had mortgaged certain talooks to Ranee Kishenpreea, and that in order to pay off her debt, defendant borrowed 11,700 rupees from him, executing a conditional mortgage in plaintiff's favor of several shares of his estate, and that the defendant retained 685 rupees of the above 11,700 rupees in his hands, paying the rest 11,015 rupees into court, to satisfy the Ranee's claim, and that as defendant did not redeem his mortgage after due notice, plaintiff brought this suit.

Defendant did not deny the mortgage, but denied the receipt of full consideration, viz., he stated that instead of 11,700 rupees, he only received 9,690 rupees, the difference of 1,325 rupees (being on account of illegal interest, *i. e.*, of 18 per cent, and charges,) having been provided by defendant himself by the sale of one of his estates, (Madubpore) and the payment of the above sale proceeds to plaintiffs, who deposited them in court, in addition to 9,690 rupees admitted by defendant to have been paid on his account by plaintiff, thus making a total of 11,015 rupees necessary to pay off Kishenpreea's mortgage. Objection was also taken to due notice of foreclosure not having been issued. This Court ruled on the 30th March 1857, that notice of foreclosure had been duly served, but that the further evidence regarding usurious interest and non-payment of the consideration money, which had been indicated by the pleadings should be taken up and considered, and this Court remanded the case for that purpose.

Further evidence has now been taken, and the judge has held upon it, that defendant's plea, that usurious interest was taken or full consideration not paid, has not been proved, and he has, accordingly, decreed plaintiff's claim.

Defendant appeals against this order, and the appeal is grounded on the character of the evidence, and the probabilities arising from the facts proved on the record.

JUDGMENT.

The witnesses, whose evidence this Court, by its order of remand of the 30th March, specifically required to be taken were, Ramnath Bose, Rugoonath Paharee, Nundcoomar Paharee, Luckeenarain and one or two others. Rugoonath and Nundcoomar Paharee have died, Ramnath, the treasurer of the zillah civil court, has been examined, as have also Mudoosoodun Podar of that Court, and Luckeenarain and Soondernarain Patee, alleged purchasers by private sale of the estate of Madubpore, which defendant avers, he sold and transferred the proceeds, viz., 1,325 rupees to plaintiff, to make up the sum necessary to pay off Ranee Kishenpreea's mortgage.

The treasurer, Ramnath Bose deposes, that 11,015 rupees were deposited in court by defendant, on account of Ranee Kishenpreea's mortgage, that the payment was made by Nundcoomar Paharee,

Luckeenarain and Soondernarain being present; that it was made by two petitions; and that by defendant's order, one receipt for the 11,015 was given to Nundcoomar. The Podar deposes to the same effect, but states, that one bag of 500 rupees and another of 600, were delivered in by Soondernarain and Luckeenarain Patee. Madubanund Bose, a servant of defendant, and Kalisunker, who had borrowed money from him, speak the former to hearing, that 2½ per cent had been at first demanded by plaintiff for her loan to defendant, and that this was reduced to 1½. The latter deposes to the same effect, and that 2½ per cent was the interest required by Tarapershad in a loan to witness. Booloosulputee, formerly defendant's cook, deposes that the consideration paid, was 9,690, and not 11,700, and that the purchase money of Madubpore 1,325 rupees was paid by Luckeenarain and Soondernarain, the purchasers of Madubpore, as part of that put into court to clear Kishenpreea's mortgage. Luckeenarain and Soondernarain Patee, the purchasers of Madubpore, depose, that the defendants paid into court the purchase money received from them as part of that paid on account of Kishenpreea's mortgage. Luckeenarain is son-in law of Kashinath, own brother of Tarapershad: plaintiff, Soorutnarain deposes, that defendant and Soondernarain Patee paid into court the purchase money of Madubpore, as part of the sum required to pay off Kishenpreea's mortgage. This witness is a mohurer of Soondernarain, looking to the position of the witnesses, (except the treasurer and podar) and their connection more or less with the defendant, and the purchasers of Madubpore, we do not consider their testimony reliable, unless it be corroborated by independent evidence. Now, the treasurer and podar may be considered independent witnesses, and the fact of the two petitions having been given in on account of the one deposit, one of those petitions specifically referring to the amount of purchase money of Madubpore, may be viewed as an independent circumstance to be weighed in coming to a decision in this case. The testimony of the treasurer and podar admits the presence of the purchasers of Madubpore at the payment, and the podar adds that these last brought some 1,100 rupees in two bags; but it is equally clear from their evidence that the deposit was made and entered on account of one payment by defendant, Luckeenarain Chowdhree; that one receipt was given for it; that that one receipt was made over by defendant's directions to Nundcoomar Paharee, and that except the petition referred to, no reliable proof is forthcoming to indicate that the 1,325 rupees referred to therein, were provided by defendants, out of the sale proceeds of Madubpore then in his hands. The presentation of that petition of itself does not afford the requisite proof that such was the case, although an inference to that effect may not unreasonably arise from the fact, unless it be shewn that

the presentation of that petition was quite reconcileable with defendant, *not* providing a part of the money from the sale proceeds of Madubpore, as he alleges he did. Now the facts on the record shew, that Madubpore was one of the estates, originally mortgaged by defendant to Kishenpreea. If the defendant, therefore, after his sale of Madubpore to Luckeenarain and Soondernarain Patee did not pay off Ranee Kishenpreea's mortgage, the purchase of these parties would be in jeopardy, it would then be by no means unnatural, that as Nundcoomar on the part of the lenders was present to see that defendant paid the 11,015 rupees still due on Ranee Kishenpreea's mortgages, so the purchasers of Madubpore should be, in like manner, interested (so far as concerned that property) in also being present, and seeing that Ranee Kishenpreea's mortgage was discharged. It does not follow, however, that because the purchasers were present, or that a petition referring to their purchase was put in; that this, standing alone as it does, and not supported by reliable independant evidence, is proof of defendant's plea, that the payment of 1,325 rupees of the sum of 11,015 then paid, was provided by him and not by the loan of 11,700 rupees taken from the plaintiffs. And, as above remarked, there is no other reliable proof of the allegation. On a consideration then of the evidence and probabilities of this case, we see no reason to interfere with the decision of the judge, and dismiss the appeal, with costs.

THE 7TH MARCH 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 352 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated the 9th April 1858.

Shamasoonderee Debbea and others, (Plaintiffs,) *Appellants*,

versus

Alladhmonee Dassee and others, (Defendants,) *Respondents*.

Baboos Sreenath Dass and *Ramapersaud Roy*, for appellants.

Baboos Sumbhoonath Pundit, *Dwarkanath Mitter* and *Bhoobunmohun Roy*, for respondents.

Suit laid at Co.'s Rs. 10,000.

THE plaintiff sues to set aside a decision under Act IV. of 1840, passed by the Sessions Judge of Jessore, on the 31st August 1855, and to obtain possession of the villages Nijkusba Burrea and Sonatunpore, in Turuf Kusba Burrea, Permassmud Shae.

Held in opposition to the view of the lower court, that the defendant's possession was upon a mortgage and not an out and out sale, and that as the stipulated term of mortgage had transpired, and the defendant had no right to hold over, order of the lower court reversed in consequence.

The plaint sets forth that Bishtochunder Deb Roy, the husband of Shamasoonderee Debbea, the plaintiff, being indebted to Fuckeerchand Talee, and in difficulties in other quarters also, borrowed from the said Fuckeerchand Talee the sum of 10,000 Rs., in order to pay off these pressing demands.

Fuckeerchand Talee demanded, as a condition of the loan, the mortgage of the two villages Nijkusba Burrea and Sonatunpore, as security for the above sum to be advanced by him, but Bishtochunder did not agree to this, and it was eventually decided to make the arrangement following. Bishtochunder was to execute an absolute sale of the two villages to Fuckeerchand, and the latter was at the same time to execute an agreement to the effect, that he would, in consideration of the sums he should derive from the villages which were to be made over to him for 12 years, give up possession of the same at the expiration of 1261. Accordingly, Fuckeerchand advanced the sum of 10,000 Rs., and two deeds, as agreed upon, were drawn up and registered; they were simultaneously executed, and they were registered together; the witnesses to both being one and the same parties. One deed was an out and out sale; the other was in the nature of a mortgage with possession. The latter deed contained particulars both as to how the 10,000 Rs. taken in loan had been applied, and as to how the loan was to be repaid. Of the sum received in loan, 5,660 Rs. (exclusive of annas and pies) was paid to Fuckeerchand himself, in payment of an existing debt; 1,853 Rs. were to be paid to one Chundeepershad, to whom Bishtochunder owed this sum; and 2,487 Rs. were paid to Bishtochunder in cash. Out of the assets assumed as the gross rental of the villages, 134 Rs. was to be allowed to Fuckeerchand as expenses of collection, 35 Rs. was the revenue to be paid to the collector, and 514 Rs. was to be

paid yearly to Bishtochunder as an allowance for his support. The surplus, after these payments, would come to 1,300 Rs., which, it was calculated, would repay the loan during the period that the villages were to be held by Fuckeerchand. At the expiration of this period, viz., at the end of 1261, the villages were accordingly given back to the plaintiff, but the defendant, the wife of Fuckeerchand, almost immediately after dispossessed her, and a case under Act IV. of 1840 having also terminated unsuccessfully for the plaintiff, she was altogether dispossessed, and she now sues to have this award set aside, and to be put in possession of her property in accordance with the terms of the agreement made between the parties to the suit.

The defendant in answer pleads, that he made an out and out purchase of the two villages, and he utterly denies that he ever agreed to, or executed any agreement which altered the nature of this transaction from one of absolute sale, to a transfer for a term of years.

The judge in the lower court disbelieved the story of the agreement, regarding it as false and fabricated, and dismissed the suit with costs.

The appeal pleadings did raise other questions, but the parties agree to waive all these, and to allow the appeal to be tried upon the single fact, whether the agreement said to have been made at the time of the sale, was or was not drawn up, executed and registered at one and the same time with the sale. This, therefore, becomes the sole issue in this appeal, for upon it depends the nature of the arrangement under which possession was given to Fuckeerchand. If the agreement was not executed, Fuckeerchand holds under an absolute sale; if, on the contrary, the agreement was executed, Fuckeerchand has no right to hold over after the expiration of 1261.

Now it is to be remarked, that there can be no doubt that the agreement was actually registered at the same time that the deed of sale was registered, for the attestation of the register on the same date on both documents satisfactorily settles all question on this point. This being so, how then is this important fact explained by the defendant. His averment is, that the registration was part of one and the same scheme of fraud, which Bishtochunder and his tools planned and perfected from the very beginning. The defendant's statement on this head is, that he gave to one Issurchunder Buxsee a blank stamp paper of 8 As. value, directing him to draw up on it a power of attorney as from the defendant, to enable him to act for him in the matter of the registration of the deed of sale, but that this person, acting in concert with Bishtochunder, employed the blank stamp paper to draw up a petition in the defendant's name, making it appear that he was present in person during the registration; some person personated the defendant, and three witnesses said

to be the persons who witnessed the deed of sale, were produced to identify on oath this imposter, and in this iniquitous manner the forged agreement was registered.

But there are not wanting some facts and inferences which go to show that this account of the defendant viewed by itself is any thing but probable. His conduct in connection with the blank paper is too absurd to merit any thing but a passing remark. In a business of this nature, it is not at all likely, that the defendant, a money lender, would trust his affairs in this loose manner to the agent of the party against whose possible dishonesty it was his interest to guard himself. It is not likely indeed, that he would have trusted any body at all, and the defendant is evidently well aware that the natural inference which would be drawn from his conduct in this respect, would be most unfavourable to him; for he has made an attempt to show that in parting with his deed of sale and entrusting it to another to get it registered for him, he had effectually guarded himself against any possible loss. His statement is, that after he paid the 10,000 Rs. to Bishtochunder, the sum was given back to him to hold in deposit till the deed of sale came back registered. But this statement is not only not proved, but it is disproved by the witnesses who have been produced by the defendant himself. These persons say, that the money was paid and carried away to Bishtochunder's house in ten different bags, on the very day and immediately after the deed of sale was signed and executed.

As without the presence of the principals or their agents, the rules of the register's office would not admit a deed to be registered, by whom, it may be asked, was the defendant represented before the register, if he did not appear in person? It is for the defendant to explain this, but his attempt to show that he did appoint an agent by whom he was betrayed, we have rejected as manifestly false, and we must, therefore, conclude, that no agent was employed at all, but that the defendant himself attended the register's office in person.

The main ground, therefore, on which the defendant impugns the agreement, is completely removed, and it now has to be seen, how far facts and inferences, as viewed from other points than those presented in the defence, support the plea on which the plaint is based, that the defendant did execute the agreement, and that he did register it in person.

The deed having been registered, it will suffice to prove its execution, if it is proved to the Court's satisfaction that the defendant was a party to the registration.

Now the first tangible fact which presents itself is this, that both the stamps for the deed of sale and for the agreement, were bought on the same day, in the same place, from the same stamp vendor; the paper for the deed of sale was, without question, bought for the

fendant, for he made use of it. The paper for the agreement was also bought for the defendant, for the endorsement of the stamp vendor says so. These facts then favour the belief that the same party who, the defendant sent for the stamp for the deed of sale, bought also the stamp on which the agreement is written.

Both were, as we have already seen, registered together. The defendant is recorded by the register to have been present at the time, and to have been identified by witnesses who were witnesses also to the deed of sale, and we have shown reasons which lead us to conclude, that the defendant was, as he has been asserted to be, personally present during the registration.

It is true that the evidence as to the defendant having been identified before the register, was not given in person in the lower court, where copies merely of their depositions were filed. Objection has been made against the acceptance of this evidence by the pleader for the defendant, but the objection is not valid, for the plaintiff has distinctly stated, that the witnesses are dead, and the defendant has not attempted to deny this or to prove the contrary. Moreover, the defendants themselves made use of copies of the depositions of the same depositions, thus acting as if the witnesses were dead.

We have seen then, as far as we can judge, that the paper on which the agreement is drawn up, was bought for the defendant by his agent, and we have satisfactory proof, that the defendant was present at the registration.

It may also be affirmed as a fact established, that though some care seems undoubtedly to have been observed to keep the arrangement which negatived the absolute sale from becoming public, many persons were, nevertheless, aware of it, and from some of these, the defendant must soon have learnt the fraud which had been practised against him, if there has been any fraud at all. Learning this, would he not have taken prompt measures to expose it, and render the attempt to defraud him abortive? But he acts in no such manner, and this affords another reason for presuming that the agreement was really executed.

This presumption is further strengthened by the conduct of the party who is the constituted guardian of the defendant's minor son. This person made a clear admission, when the lease under the agreement had just expired, that the villages had only been temporarily transferred to Fuckeerchand, but that the advance had not been fully paid. This admission was soon afterwards withdrawn, but the fact that it was made at all, is surely a strong proof of the agreement coming from such a quarter.

Then again it is in evidence, that in 1257, (7 years after the agreement was made) the plaintiff filed a petition in a butwarah case, in which Fuckeerchand was a principal party, and in this, express men-

tion is made of the agreement, and all its conditions are likewise fully given. Of this petition, and the eventual claim which it was evident the plaintiff intended at a future day to set up, the defendant could not possibly have been ignorant; and yet we do not see that the evidence thus given of this gross fraud committed upon him, took him at all by surprise, or that it suggested to him the necessity of instituting legal proceedings for the protection of his rights under his purchase.

The pleader for the defendant urges on behalf of his client, that the whole of the evidence which goes to connect Fuckeerchand with the agreement, is of too artificial a character to be entitled to any credit. That while it is not usual that the witnesses should have their depositions taken fully before the register of deeds as to the identity of principals appearing in person in his office, the witnesses in this case were examined in that unusual manner. That the petition in Fuckeerchand's name said to have been given to the register by Fuckeerchand himself, shows also that an unusual desire existed to make evidence in support of Fuckeerchand's personal presence at the registry office at the time of the registration.

But we think, that the vakeel may be quite right, that there was a manifest care to provide evidence as to Fuckeerchand's presence at the registry office, without his being right in the conclusion he draws from this circumstance. It is plain, that whatever the object of the parties may have been in the concealment, it was the wish of both at the time that the out and out sale should be widely published, while the arrangement under the second deed, the agreement, should be kept as quiet as possible This being the policy agreed upon by the parties, it is easy to understand, when no body else but the parties concerned were to be allowed to know any thing of the transaction, why the plaintiff should have been so particular that Fuckeerchand should give such proof of his attendance at the time of the registration as would prevent him from afterwards denying the deed. Another point on which the pleader lays much stress as tending to show that Fuckeerchand was not concerned in the registration of the agreement, is the unusual manner in which he was identified in the register's office. He urges, that where a principal appears to register his own deed, who is not known in the register's office, he is invariably required to produce some person of respectability who is known to the department, to certify to his identity, but in the case of Fuckeerchand there was a departure from this cautious and customary course, inasmuch as the registry officers were satisfied with the evidence of men of low condition and of whom they knew nothing.

But this allegation is not one which carries with it any weight, for in the absence of any evidence to the contrary, we must presume

that what was done by the register in this case was rightly and formally done.

It was then argued by the pleader for the defendant, that the very terms of the agreement as compared with the evidence which has been adduced in support of it, will show how impossible it is, that any belief can be given to such an absurd transaction.

In support of this view, the pleader refers to certain conditions of the agreement, viz., that Rs. 514 was to be paid in daily allowance to the plaintiff for her support, that the debt to Chundeepershad was to be paid off, and that possession of the property was to be given up in 1262, on all which points, he contends, there is either no proof at all, or the evidence such as it is, is altogether worthless.

But more remarkable than the failure of proof on these points is, the pleader continues to say, the inadequacy of the return which the defendant is represented in the agreement to have been satisfied with. Thirteen hundred is said in that deed to be the utmost sum available yearly towards the payment of the loan of 10,000 Rs. If 1,200 Rs. of this is allowed, as allowed it must be, as the interest upon the loan, there remains but 100 Rs., as available year by year towards the extinction of the principal. Thus in 12 years, the defendant got in payment of principal 1,200 Rs. and as by the terms of the agreement, he is required to give up possession, whether paid off or not, at the expiration of the 12 years, this condition in the agreement can only be accounted for by supposing that the defendant, who is a professional money lender, voluntarily sacrificed with his eyes open, 8,800, without any motive or advantage!

Nor does it, the same pleader goes on to say, help to clear up this remarkable feature in the transaction if the statement of the plaintiff is admitted on this head, viz., that interest was to be allowed on her side also, for however, the accounts might show on paper if made up in this way, the fact still remains that the defendant's original loan of 10,000 Rs. has been wiped out by a payment extending over 12 years of only 1,200 Rs.

But whatever might be the force of these arguments, as we have held upon the proofs, that the two deeds were executed together in presence, in the knowledge and full consent of both the parties to this suit, and as in respect to the nature of this transaction, there is no ambiguity that it was a temporary lease on a loan, we do not think, that any consideration derived from arguments as to the absurd nature of the transaction, should induce us to refuse to restore the parties to that status which they mutually contemplated, now that the term of the lease has expired, merely upon the ground that it is difficult to understand all the incidents connected with this transaction.

Not able, then, to prove this agreement a fabrication, the pleader for the defendant in conclusion contends, that as by the admission of the plaintiff in the Act IV. case, the transaction was a fraudulent one to cheat creditors, the Court should, in conformity to its own previous rulings, refuse to give the plaintiff a decree.

We observe, however, that in the cases cited, a party was asking, as against another present in the suit, the assistance of the court to rid him of the effect of his own fraudulent act. But in the present case, whatever may have been the motive of the transaction as to third parties, it was as between the parties before us *bonâ fide*.

We accordingly decree the appeal, and reverse the judgment of the lower court, with costs.

THE 7TH MARCH, 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 353 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Officiating Judge of Jessore, dated the 9th April 1858.

Teeluckchunder Bose, Auction Purchaser, (Plaintiff,) *Appellant*,

versus

Alladhmonee Dassea and others, (Defendants,) *Respondents*.

Baboos Kishenkishore Ghose and *Unnodapershad Banerjea*, for appellant.

Baboos Sreenath Dass, Sumbhoonath Pundit, Dwarkanath Mitter, and *Bhoobunmohun Rae*, for respondents.

Suit laid at Company's Rupees 10,000.

THIS is another appeal from the decision of the judge, which we have this day disposed of in the foregoing suit.

Held, that as the appellant was no party to the suit in the lower court, he has no right of appeal.

The appellant was a third party to the suit in the court below, and his object was to prove that the defendant held only on a temporary lease. We have held, that that was the true nature of the tenure, and so the purpose of the appellant has been fully gained. Still as he has no right of appeal, as not having been a party to the suit, we must declare his appeal informal, and dismiss it, with costs.

THE 13TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 483 of 1858.

Regular appeal from the decision of Mr. F. B. Kemp, Judge of Backergunge, dated the 24th March 1858.

Kumlakanth Mozoomdar, Pauper, (Plaintiff,) *Appellant*,

versus

Ornopoorna Debbea and others, (Defendants,) *Respondents*.

Baboos Kishenkishore Ghose and *Dwarkanath Mitter*, for appellant.

Baboo Onookoolchunder Mookerjea, for respondents.

Suit laid at Company's Rupees 6,657-4-6.

Held, that though from the evidence on the record it appeared that arrangements had been contemplated with a view to the settlement of the differences between the plaintiff and defendants, still the court is not satisfied that the deed upon which the suit is based was executed by the defendants. The suit of plaintiff is therefore dismissed, with costs.

PLAINTIFF, Kumlakanth Mozoomdar, pauper, sues Ornopoorna Debbea and Bowanee Debbea, defendants, for possession with mesne profits of a 7 anna share in a farming lease of a resumed khas mehal, Chur Pudda, pergunnah Dakhin Shabazpore.

Plaintiff alleges, that the Chur Pudda khas mehal was farmed out to Bindabunchunder Baboo by the Collector, but was brought into cultivation by him, who held a sub-lease from the aforesaid Baboo; that subsequently, the Revenue Authorities concluded a farming settlement with the defendants and Kalidebea, who has since deceased, and that from that settlement, the Baboo appealed to the Revenue Commissioner, who called for an explanation on several points from the Collector; that the defendants induced plaintiff, who was the real appellant, to withdraw this appeal by admitting him to a 7 anna share in the lease granted to them; that a shareekutnamah, or deed of joint tenancy was executed on the 17th Bhadoon 1254, for a consideration of 266-10-6; that on the 17th Augun of the same year, this deed was registered, and he regained possession of his right, and obtained kubooleut from the tenant of his 7 anna share; that the defendants, subsequently, fraudulently persuaded the tenants through their servant, not to pay him rents; that consequently he sued a ryot named Takoordoss Soothar, for the rent due, and obtained a summary decree, but on appeal to the civil court this order was reversed in consequence of the proof of the kubooleut not being satisfactory; that he, since Falgoon 1256, has been dispossessed of his 7 anna share through the agency of defendant; that as subsequent to the death of Kalidebea, and on the expiry of the previous lease, the defendants have obtained a renewal of the same, plaintiff brings the present action against them for possession with mesne profits, from the date of dispossession, of 7 annas share of the property.

The defendants deny the execution by them of the deed of co-parcenary, and its registration by any party authorized by them to act. They moreover allege, that they never admitted plaintiff to a share

of their lease, that they consequently never dispossessed him, and the plaintiffs' suit should be dismissed.

On the issue whether the deed of coparcenary was a *bonâ fide* document, the judge remarks, that out of the six subscribing witnesses to it, only two persons, and they peadas, have been examined, and that the evidence of the writer of the instrument, Gobindpersad Bose, has not been taken.

The evidence of these two witnesses the judge entirely discredits, both from the fact of their being creatures of the plaintiff, and from the nature of the statements given by them, which enter with suspicious minuteness and particularity into matters which occurred more than 10 years previous. The deposition of Ramkanai Bose, who was at the time of the transaction nazir of the Bulloah collectorate and is now deputy magistrate of Dakhin Shabazpore, and that of Joychunder Mozoomdar, who was the serishtadar of the Bulloah collectorate, and is now a deputy collector in the survey department, the judge considers in no way to prove that the defendants executed the deed now propounded. As to the petition presented by Ramkissore Mookerjee on the 23rd Bhadoon 1254, a week subsequent to the date of the execution of the deed, who was son-in-law of one of the defendants and their mooktear, the judge remarks, that it is not binding on the defendants; for it has not been proved that their petition was presented with the consent or cognizance of the defendants, nor has it been shown that Ramkissore Mookerjee was authorized to present any such petition on behalf of the defendants. The judge consequently dismisssed the plaintiffs' claim with costs.

From the decision of the judge, adverse to him, the plaintiff has now appealed to this court. He urges, that the evidence on the record is composed of the depositions of trustworthy and respectable witnesses, and that it satisfactorily proves the execution of the deed, and the subsequent possession of the property for which he now sues.

The direct evidence to the execution of the deed consists in the statements of two peadas. Their depositions, as remarked by the judge, give an account of the transaction, which is alleged to have occurred ten years previous to the time at which they deposed with suspicious particularity and minuteness, and looking to the nature of the statements and to the absence of the writer of the deed, of whose death there is no suggestion on the record, we entirely agree with the judge, that they are quite insufficient of themselves to prove the execution of the instrument propounded by the plaintiff, but it has been pressed upon us by the pleader for the plaintiff, that though unsupported, the evidence may be insufficient, yet when it is corroborated by the fact of the registration of the instrument by the admission of an acknowledged mooktear of the defendant,

that the coparcenary existed, when also from the evidence of respectable persons, such as the deputy magistrate, Ram Kanai Bose, and deputy collector, Joy Chunder Mozoomdar, who was at the time filling situations, which gave them a full knowledge of the transaction, it appears that to their knowledge, arrangements had been come to between the plaintiff and the defendants, with all this corroboration, the direct evidence becomes trustworthy, and altogether sufficient to warrant the passing of a judgment in plaintiff's favor.

As to the registration of the deed we observe, that the registration took place three months after the date of its alleged execution. That the party attending to register on the part of the defendants, was one Obhoychurn Bose, he has not been summoned, neither has any trustworthy evidence been given as regards the registration. We consider, therefore, that the registration after a lapse of time, a delay which has been left entirely unexplained, is rather adverse to than in favor of the genuineness and authenticity of the instrument propounded by the plaintiff.

As to the admission of Ramkissore Mookerjee, we are inclined to put more value on it than the judge has done—in the face of the repudiation by the defendants of any authority in that person to present such a petition, it would have been well for the plaintiff to have summoned him, but notwithstanding that this has not been done, as he was the admitted mooktear of the defendants, and as it was in the course of his business to file this petition, we must presume that it was done with authority, unless the defendants can show the contrary, which they have not attempted to do. This petition then shows clearly, that at the time of its presentation on the 25th Bhadoon 1254, the defendants had made the plaintiff a co-sharer to the extent of 7 annas in the property, it says nothing however, of the execution of the instrument upon which the present suit is based, and therefore, only indirectly supports that document.

The deposition of the present deputy magistrate of Dakhin Shabazpore, and the deputy collector, Joychunder Mozoomdar, amount at the very utmost to this, that they knew that arrangements for the settlements of the differences between the parties before the court was in course, though they are not acquainted with the detail of them, and the latter officer adds, that in consequence of those arrangements, the particular explanation which was returned to the Commissioner of Revenue in answer to questions of that officer was made. These statements are doubtless to a certain extent evidence of some arrangements having been contemplated by the parties before us, but nothing more.

Although we are of opinion from the whole evidence before us, that arrangements had been contemplated, and in course of completion between the plaintiff and the defendant, by which the differences

then in existence between them were to be put an end to, but we at the same time entirely disbelieve that the particular document on which this suit is based, was ever executed by the defendants, and that by that execution, the arangements were completed, it may be, that had the plaintiff brought his suit in a different form, he might have obtained that which he has now sued for, but we cannot allow the plaintiff to supplement the acts of defendants by deeds which they have never executed, or to perform for them, acts which perhaps they are legally as well as morally bound to perform.

Under this view of the case, we dismiss the appeal, with costs.

THE 16TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 485 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Acting Judge of Jessore, passed on the 12th June 1858.

Raja Prosunnonath Roy Bahadoor, (Plaintiff,) *Appellant,*

versus

Rasmonee Dossee and others, (Defendants,) *Respondents.*

Baboo Sreenath Dass and *Mr. W. Ritchie,* for appellant.

Baboos Bungshee Buddun Mitter, Kishenkishore Ghose, Ramapersaud Roy, Hurkally Ghose, Jugdanund Mookerjea, Mohesh Chunder Chowdhry, Obhoychurn Bose, Poorunchunder Rae, Aushootosh Dhur, and *Ramanath Bose,* for respondents.

Suit laid at Co.'s Rs. 81,900.

THE judgment of the judge gives in very full detail the history of this case, and contains an analysis of all the evidence tendered by each party, together with the judge's comments thereon, and the conclusions he arrived at after an apparently very full consideration of the proof, the judgment of the judge is, therefore, given in extenso.

The judgment of the lower court affirmed on the merits. Rules laid down for the calculation of costs to be awarded to defendants made parties to the suit, but who hold separate and independent interests in the lands sued for, such persons to get costs in proportion to the interests held by them, and not as given below, at an amount epual to the

"This is a suit for the recovery of certain lands valued at rupees 81,900. The issues in bar were disposed of in favor of the plaintiff on the 7th January last. The intermediate time has been occupied with the filing of the written evidence, and with the procuring of the attendance of the numerous witnesses on both sides. The issues of fact disposed of in the present decision are as follows:—

1. Whether the land in dispute belongs to the villages of Ghagha and Dhomitollah, Turuf Maoul, Pergunnah Nuldee, being the mouroosee right of the plaintiff, or to the Pergunnah Mokimpore, the zemindaree of the defendant, Rasmonee; and whether it is separated by the khal known as Foloibund?

full value of the suit.

2. Whether the plaintiff and his predecessor had been in possession of the land in dispute until the day of dispossession?

"Other issues were filed by certain talookdars and lakhirajdars, which, if necessary, can be eventually considered. The claim of the plaintiff was, that he had been dispossessed from a part of the land during his minority, when his property, being under the Court of Wards, was leased out to Baneekant Roy, that a further dispossession took place or was discovered to have taken place, at a time when, after the attainment of his majority, he had leased out his property to Messrs. Dunlop and French, and that a final dispossession was affected on certain dates in the year 1261, which are accurately given. When the property was once more in his own management, complaints were in that year made in the criminal court, but nothing was affected, and part of the dispossession having occurred during minority, and not being affected by time, the plaintiff now sues for re-possession of the whole land, being no less than 68 khadas and 5 pakees, or something like 1,600 beeghas.

"The defendant denies the fact of dispossession, asserts right and title, and is supported by several small talookdars and rent-free holders, who claim part of the land.

"The case is one for a careful examination of the documents intended to throw light on the point of the title raised on the first issue.

"The written evidence, which is very voluminous, is reviewed in detail and in due succession, as follows:—It should be observed, that the plaintiff says, that there are eighteen *dangahs* in dispute, or slightly elevated lands, lying higher than the remainder of the plain, which is marshy, and that all these *dangahs* are mentioned in the course of his documentary evidence. The defendant says, that they are twenty-one in number, and she equally lays stress on the frequent mention of them in her written proofs of title. According to the plaintiff, the *dangahs* or elevations are named—

1.	Augurbati ...	In the village of Ghagha.
2.	Joahdangah ...	
3.	Tarabheel ...	
4.	Rageerdangah *alias* Noandangah ...	
5.	Dhoobeel or Budargaria ...	In the village of Dhomitollah.
6.	Singadooree ...	
7.	Bohaltolee *alias* Madharee or Madhila ...	
8.	Joarea *alias* Hingadanga ...	

"The first document placed before the court is a decision of the court of the sudder ameen of the 26th March 1817, in which one Manick Chunder, a rent-free holder, sued certain Boses, the zemindars of the present plaintiff, and was unable to prove his claim to some rent-free lands. In this claim there is mention of Singadooree.

But besides that this was *res inter alia;* it is by no means conclusive as to the extent and exact position of the one *dangah* named. The utmost that can be inferred is, that some portion of a mound, named Singadooree, may have been asserted to belong to the zemindars under whom the plaintiff holds an under-tenure. The zillah court's decision of the 5th December 1818, merely affirming the decision of the lower court, may be disposed of with the same remark.

"In a decision of the sudder ameen, dated the 17th May 1820, between two ryots of Ghagha and Dhomitollah, both of them the plaintiff's village, there is mention, certainly of Madharee or of No. 7. But it is clear that the *dangah* was first sued for by the plaintiff as Bohaltolee, and that the *altus* was never mentioned until the *rejoinder* was filed.

"Still less, can much stress be laid on a decision of the same court, dated the 25th January 1825, in a case where one Ramcoomar Biswas sued Ramnath Roy, the father of the plaintiff, for the case was compromised, and it only mentions the doubtful *dangah* of Madhila, and mentions it as to the *west* of the land then in dispute.

"Equally slender, again, is the inference to be drawn from a decision also of the same court, dated the 10th January 1833, in which one Nilmonee, pauper, sued Sunkoree Dasea, the mother of the present plaintiff. In this case, one Ramsunker, an inhabitant of Ghagha, said that he knew the land, and that Bohaltolee was within it. But on reference to the deposition of this witness, which is in Persian, it is evident that the *dangah* may be read as Hijaltolee as well as Bohaltolee, from the absence of the diacritical points, and I incline to the opinion, that it is Hijaltolee; no such *dangah* being claimed by the plaintiff. In the same case, Ramlochun, a witness, mentions Mauhultolee or Bohaltolee as in Ghagha, but Mauhultolee is not claimed, and though Nilmonee, the then plaintiff, mentions in his plaint, Joarea *alias* Hinga and Budargaria, his case was dismissed, and his mere assertion will not settle the question that the *dangahs* are within Ghagha and nowhere else.

"On the 21st of December 1843, when Bholanath Mojoomdar sued Rasmonee, the present defendant, a witness named Adeekhankar said, that the khal Foloibund was the boundary of Nuldee, the present plaintiff's, and of Mokimpore, the present defendant's property. The case, in spite of this evidence was dismissed, but still this is good evidence, that an independent witness, years ago thought that to be the boundary which the plaintiff now asserts to be the boundary.

"A map, drawn out by Mr. W. Stopford, deputy collector in 1844, in a resumption case, does also lead to the inference, that this khal is the boundary; but the contested land only comes into the very edge of the map which was made for lands much more to the east

of those now in litigation. So this, again, is but a slight ground of inference.

"The plaintiff's counsel laid considérable stress on the deposition of Ramtonoo in the case of Bholanàth *versus* Rasmonee, who said that a certain *ail* or small embankment was the boundary of two villages, Bhusail and Khomardangah, both the property of Rasmonee, and that the *ail* was not more than 2 or 3 yards from the khal. The point here is, that the *ail*, which the defendant now calls her boundary, is clearly in all the maps filed, 40 or 50 beegahs off from the khal. But it is by no means clear, that the *ail* alluded to by the witness, and the *ail* now relied on by the defendant, are one and the same. The villages are quite different, *ails* are to be met with everywhere. How can it be assumed that both *ails* are identical?

"A decision of the principal sudder ameen, dated the 31st August 1844, in a case where the present defendant sued Mr. A. C. Dunlop, is not to the point at all; 60 beegahs or so were then claimed; but there is nothing in the decision to show whereabout these 60 beegahs were.

"We now come to the proceedings of the magistrate. In 1854, Pauchoo Biswas, a ryot, complained against Ramkishore Ghose, the naib or deputy of the defendant, for carrying away his crops; but the magistrate who ordered the police to investigate the matter, dismissed the case, *because* the plaintiff and other ryots failed to bring their proofs. It appears further, that about this time or the time when the final dispossession from dags Nos. 2 and 8, comprising about 16 khadas of land, is said to have taken place, five ryots in all of the plaintiff did represent the matter. Both Pauchoo abovenamed and Ibrahim Ghungee, in the months of Joystee and Assar 1261, did state that the agents of the defendant had cut corn on the west of the khal, where they had no business, and had dispossessed them; and when the darogah reported on the matter, they objected to the report as a partial and one-sided report, mentioning at the same time, some of the *dangahs* now in dispute. The matter ended, however, by the agents of the plaintiff saying, that they would not try the criminal court any more, but would bring a civil action. So nothing was ever done, and the magistrate, as before mentioned, struck the case off.

"A proceeding of the deputy collector, dated the 30th January 1856, is only mentioned to show, that it has no bearing on the present case. It relates to some complaints against an agent of Rasmonee for fraud.

"We now come to the measurement papers of the years 1179 and 1216. It is indisputable that in these papers, which are very detailed, showing every plot of ground over a large area of country,

there is mention of Joarea in plot No. 1083, of Budargaria in plot 341, of Rageerdangah in plots Nos. 29 to 110, of Tarabheel in plot No. 111, of Joahdangah in plot 562, of Singadooree in plots Nos. 121 to 182, of Bohaltolee in plots Nos. 187 to 272, of Joahdangah in plots Nos. 422 to 429, and so on in some other plots. It is also shown, that some of these measurement papers were filed in Court in the case of Shumboo Bhuttacharjee *versus* Sunkoree Dasea in the year 1228.

"But here arises a very significant point,—when the present case was under preparation in the court of the principal sudder ameen, an agent of the defendant, named Gopaul, brought it to the notice of the court, that whereas the name of Prannath Roy, the father of the plaintiff, appeared in three out of four bundles of measurement papers of the years 1216 and 1230, the name of the plaintiff himself, Baboo Prosunnonath Roy Bahadoor, appeared on the 4th of date 1216, at a time when he had not been born, the plaintiff's agent afterwards said, that the leaf in question, on which the said name appears, had been introduced by the agents of the defendant to damage the case. But there was no proof of this. The vakeels were questioned, and they said they knew of no change, and the matter was left undecided, but fully on record. The measurement papers have every leaf of them exactly the same appearance. The inference which the defendant's counsel would draw, is, of course, that the whole papers were cleverly forged lately, and that the introduction of the plaintiff's name, instead of his father's, was a mistake of the forger. This is not proved beyond doubt; but the fact itself of the name occurring as it does, and of the investigation commenced, is one which raises extremely grave suspicions in the mind of the court. The point will be taken into consideration in summing up.

"Ramcoomar Chuckerbuttee, a rent-free holder, sued one Sheik Masad, a ryot of Ghagha, for *bromuttur* land. Sheik Masad said, he had no connection with any of the *dangahs* now claimed, and that another ryot was in possession. It is obviously impossible to draw any thing but the very slenderest inference any way from such a reply, which may have been interested, or partly or wholly untrue.

"Some stress was laid by the plaintiff, and copies of some measurement papers of the year 1225, filed by Rasmonee, when sued by Mr. Dunlop, which mention land of the defendant as being on the east of the khal, which was then filling up, and which might lead to the inference, that there was no land of the defendant on the west of the khal, as now claimed. But on procuring the originals from the records of this court, it was seen that some leaves omitted in the copies filed by the plaintiff, did show land to be claimed on the west and on the south also.

" Some agreements of ryots for the year 1255, granted to the predecessor of the defendant, merely show that they are for the land to the east of the khal. This is the veriest negative inference in the world.

" Shumbhoonath, a ryot of Nuldee, in the year 1227, sued the plaintiff's father, and in this case were filed the measurement papers in 1179, against which there are no grounds of suspicion, and which papers mention the *dangah* of Lacbladangah. But Lacbladangah is an *alias*, and it is not shown how the case in question ended.

" In the same case, however, one Reazuddeen filed an answer, saying that the above *dangah* was in Ghagha, and that the land was not rent-free *bromutter*. It is scarcely possible to impute collusion to a party making such a statement years ago, and this point is in the plaintiff's favor.

" Of the measurement papers of 1230, it must be said that plots 597 to 678 mention Rageerdangah, 679 to 816 mention Tarabheel, 428 to 591 Joahdangah, 360 to 422 Augurbati, 305 to 333 Dhobeeldangah, 238 to 305 Singadooree dangah, 148 to 277 Bohaltolee, and 481 to 488 Joahdangah. These are the papers to which allusion has been made on account of the premature entry of plaintiff's name in the papers of the year 1216, filed simultaneously, and the defendant's counsel show, besides, that Bholanath mentioned in these papers as holding land in 1230, did not in fact obtain the same till six years afterwards, or the year 1236; here again is matter for very grave suspicion.

" Bholanath Shome sued the father of the plaintiff for some land in the villages now contended for, and mentioned Joarea in his suit, but the matter was compromised.

" Some *jumma wasil bakee* or rent collection papers show that part of the bheel or marsh of Chundaldighee, at one end of the land now disputed, with its fishery, as the plaintiff's, but the plaintiff does not now claim all the marsh in question, and so this document decides nothing, for two or three parties may divide a bheel.

" In a case where the defendant sued Mr. A. C. Dunlop there is only mention of land to the east of the khal, this, as already observed, is a mere slight negative inference, *i. e.*, that there is no land to the west.

" The answer of one Hisaumdeen, of Dhomitollah, in a suit brought by one Nudyachand, mention, *Ambaria*, but no such dangah is in the claim.

" There are several kuboolyuts or agreements for rent extending from 1251 to 1261, and fifteen of the ryots signing them, have appeared, supporting the plaintiff, but of course, in such a case, it is not necessary to say more than that generally, either

party can readily find persons to back them. A case like the present does not turn on kubooleuts.

" Almost the last documents filed by the plaintiff direct, are the depositions of three ryots, Gungaram, Wafee Luskur, and Ramchand, who, in the case of Bholanath Mojoomdar above said, as for the defendant's side of the question, that the khal Foloi und was the *real* boundary between Mokimpore and Bhusail, or between Koomardangah and Bhusail. But these are not the villages now in dispute, and though the first inference may be that a khal is a likely boundary of two estates or villages, and though it be deposed to that the khal does actually separate two villages, yet it is of course possible to destroy such inference by direct proof to the contrary, as will be seen. One of these depositions, too, had been so much injured by damp as to be almost illegal.

" Hisaumdeen, a respectable person residing in Dhomitollah, filed certain documents on behalf of the plaintiff, on oath. Amongst them were several kubooleuts or ryot's agreements, either in favor of his, witness' father or of himself. One from Hasanulla to his father, mentioned Augurbati and Dhobeel, another from one Dedar Mahomed, mentioned Joarea and Singadooree, a third, dated 1217, mentioned Rageerdangah, Dhobeel, and Singadooree, a fourth of 1249, mentioned Bohaltolee, and Singadooree, and a fifth of 1256, Bohaltolee, Dhobeel and Singadooree. All the givers of these are residents of either Ghagha or Dhomitollah. It is argued, that the documents are neither forged nor collusive. Putting aside for a moment all questions as to their being genuine, they do show that these dangahs were dealt with by people within the property of the plaintiff as belonging to that property. But there is a full evidence on the other side that the dangahs belonged to Mokimpore. It may really be for consideration, whether dangahs so named may not extend over both properties, and appertain to land other than that in dispute. The above witness also filed measurement papers, being *chittas* and *kutians;* but they are mere papers which have remained in the village, and, of course, may have been altered or arranged as may best suit the plaintiff.

" Very little can be made of similar documents filed by a witness named Panchoo. There are twelve kubooleuts said to have been given to his father, mentioning several of these dangahs which are nearly all illegible, and some measurement papers to the same effect, which have never been out of the village.

" On the above documents does the plaintiff's claim rest. That, if unrebutted, or entirely above suspicion, they might not make out a very good case, I should not be prepared to deny. But before pronouncing on them definitely, it is necessary to go fully

through the whole of the evidence for the defence, which is as follows:

"The defendant maintains that, besides the eight *dangahs* claimed by the plaintiff, the land in dispute contains several others, and frequent mention of them will be made in the course of the evidence. One Ramjoy Bhuttacharjee sued Radhakant Bhuttacharjee, and in that case, dated April 1810, the measurement papers relied on, none mentioning Hinga Singadooree, Joah and Dhobeel, were filed. This proves them as papers beyond suspicion. They must be weighed with others for what they are worth in themselves.

"Government endeavoured to resume 3,000 beegahs from one Rajchunder Roy. Very little can be made of the papers in this case, because, though four boundaries are given, they do not show that the land in dispute now is therein included, but one proceeding of the collector does show that the khal Foloibund separated the village of Koomardangah in Mokimpore from Dobusee in Nuldee.

"Bholanath Shome sued Ramkani Mojoomdar for a mortgage on Dhomitollah, and got a decree in 1830 or 1236. The defendant argues pertinently, that this being the case, his name could not possibly be in any measurement papers in 1230, which the plaintiff's counsel replies that he had a *jumma* or mere ryot's holding in that village before, but the defendant's counsel scattered this argument to the winds, by showing that in the said measurement papers he is entered, not as a ryot, but as a small talookdar, which he could not have been six years before the mortgage and decree.

"One Gungadhur Dass sued Rajchunder Roy, the husband of the present defendant, for some land, when the defendant put in the measurement papers of 1209, and the case was dismissed by the sudder ameen in May 1830, mention being made of the measurement papers in the decision. The plaint in this instance was for land to the south of the khal. There could be no collusion here, and it is scarcely possible to avoid the conclusion that the defendant was asserted by a third independent party to have some land *south* of the khal, and was so held to have such land.

"The special deputy collector or resumption officer sued certain Bhuttacharjees, now made defendants, for 2,000 beegahs. An ameen went to measure the land and found that plot No. 22 contained part of Joahdangah, No. 23 Bohaltolee and No. 25 Singadooree and Hingadangah. The land was eventually released. It is scarcely possible to avoid the conclusion that the lands now claimed

by these co-defendants as rent-free, and as wrongfully claimed by the plaintiff to be his zemindaree, were then left in their possession by the officer whose special business it was to investigate such tenures and claims.

"One Mahomed Sikdar sued Nilmoney Sirdar for rent for Hingadangah, both are said to be ryots of the defendant. The plaintiff sued on a *jumma*, said to belong to the village of Barparah in Mokimpore, and it is certain that he got a decree on the 13th November 1840, which is after the date of the first alleged dispossession.

"When government was again suing some more of the Bhuttacharjee family, an ameen, Mohun Chunder, went to the spot, and, though most of the land then in dispute was to the north of the khal, plot No. 15 was entered as on the south of the khal. The plaintiff endeavours to meet this by pointing out a place in the map which would make the plot to be more to the east altogether, and quite away from the land in this present case. But be that as it may, it is clear that the khal is not invariably the boundary, and that Mokimpore does come to the south of it in some place or other.

"The suit of government was, moreover, dismissed in September, in 1841.

"In the suit of Bholanath Mojoomdar *versus* Rasmonee, Budderudeen Abed Ghazee and Chirag Alee deposed in 1843, that the villages of Bhusail and Barparah or Bagparah, were separated by a small *ail* or embankment coming out from the khal, and that the khal was filling up, and belonged to Mokimpore, but this evidence, as will be noticed, is inconsistent with that given afterwards by one of these persons.

"Rasmonee sued Mr. A. C. Dunlop for 60 beegahs. All that can be gathered from this is, that a map of the deputy collector before quoted was not thought to outweigh some opinion of the collectors. But this does not discredit the map as an untrustworthy document entirely.

"Rasmonee appealed to the judge aganist the decision of the sudder ameen, giving land to Bholanath in the document last but one quoted, which land was to the south of the khal; and the judge, on the 16th September 1844, reversed the decision, and gave the land to Rasmonee. But from the map I take the land, though to the south of the khal, to be clearly not identical with the land now claimed.

"Government sued Rasmonee for 3,000 beegahs, and in February 1846, the case was struck off as not likely to be proved. Nothing can be gathered from this. The same may be said of a decision of the moonsiff, of April in the same year, when one Mohesh

Dass sued Nimai, and the case was compromised, for it is not shown to what villages the litigants belonged.

"In 1261, a burkundauze deputed to the spot, when the parties were quarrelling at the time of the asserted final dispossession, declared that the plaintiff's people were endeavouring to measure the land stealthily by night. If the policeman's character and evidence were beyond suspicion, such a statement would throw the greatest doubt on the plaintiff's claim. But, though it is hardly likely that the burkundauze would invent such a report, it is not quite safe to give the statement implicit credence as to found any argument on it entirely subversive of the plaintiff's claim.

"One Kumlakant Bose of Mokimpore sued Suroopchunder Biswas of the same pergunnah for rent for the years 1258 to 1261, and got a decree. The kubooleut then filed in the case showed that Tarabheel and Joareadangah were within the land sued on. This, of course, is a small point in favor of the defendant. Two decisions of March 1856, in two cases, where the plaintiff sued two ryots for rent as within his *debutter* lands, and the additional principal sudder ameen thought certain kubooleuts new and not genuine, are relied on to show general bad faith and unscrupulousness on the plaintiff's part; but they seem to me very meagre evidence to support such a charge.

"On the 15th of August 1857 or last year, one Fakeer Mahomed complained to the deputy magistrate, that he had been confined by the plaintiff's naib or agent for fourteen years, and ill-treated, because he would not swear falsely. But it is not shewn what became of the matter.

"In a case of Act IV. of 1840, for summary possession, the deputy magistrate thought certain papers of the plaintiff, false, and dismissed the case; the decision being confirmed in appeal. This, of course, is the nearest vague presumption of general bad faith.

"A deposition of one Mohimachunder Sircar, dated the 27th November 1857, in another case, is brought forward to show that this man has been a witness before, and that very lately, though he denied the fact lately, when giving evidence for the plaintiff in this present suit: of course this does not tell in the plaintiff's favor.

"A proceeding of the deputy collector of the survey, dated February this year, merely shows that Mr. W. Stoddart claimed some land from the defendant to the west of the khal, but was unable to get it, which is not extraordinary, as Rasmonee was obviously in possession of the land now in dispute, which it may fairly be assumed, until shown to be other land, was that claimed by Mr. Stoddart.

"Two depositions of witnesses for the plaintiff are brought to show that they had given evidence before, though they denied it now. But a man in this country, at least, may deny one thing, and yet speak truth with regard to half a dozen others at the same time.

"That there is no mention of Dhomitollah as belonging to Turuf Maoul in some quinquennial papers of 1202, though there is mention of Ghagha is nothing to the point, for it is not decided by the defendant, that there is such a village as Dhomitollah, and that it belongs to the plaintiff.

"Now came a quantity of measurement papers of the village of Barparah, of 1203 and 1209; the first set were given to the canoongoe, when such an officer existed, and so were filed in the case of Gungadhur Mitter in 1820, are stamped in every page of three sets out of four, with the seal of the court, and are so far beyond suspicion. In the first mentioned papers, there is mention of the *dangahs* Joarea and Bohaltolee, and in the second there is mentioned in plot No. 1232 of Singadooree to the south of the khal Foloibund, in Nos. 1264, 1272, and 1536 of land to the south of the same khal, in Nos. 939, 891 and 923 of Dhobeeldangah, in Nos. 1306 to 1372 of Singadooree, in Nos. 1488 to 1538 of Tarabheel, in No 1539 of Dhobeeldangah, and in No. 1824 of Hingadangah. These papers are as good if not much better than any similar papers filed by the plaintiff, and there are *kutians* or abstracts to correspond; but they remained in the defendant's records.

"In the year 1215, an ameen went in the case of the plaintiff Ramjoy Bhuttacharjee to divide the land which was in Barparah Kismut, and Barkali, of Mokimpore, and his report distinctly mentions Hingadangah in the land in question.

"There are a number of *douls* or engagements of ryots of the years 1215, 1231, and 1240. Some of the givers or the heirs of the givers have deposed to these papers.

"Of a number of measurement papers left by the talookdars with the canoongoe, whence they got into the collectorate, it may be said briefly, that they mentioned Singadooree, Joahdangah, Bohaltolee, and Dhobeel and others. Some of the papers are obscure and nearly unintelligible, and there is no official signature to them.

"The papers of the zemindaree records of three villages, Barparah, Kisubpore and Bullubpore, have several of these dangahs mentioned in them, but the papers are mere zemindaree ones, never entered in any court or office.

"An agreement given by Mr. A. C. Dunlop to the defendant, shows that it is for land somewhere to the east of the Foloibund

khal. It mentions an *ail* or embankment, but there is nothing to show where the *ail* is, or that it tallies with the boundary now claimed by the defendant, neither is it clear that it tallies with Mr. W. Stopford's map.

" An agreement of a ryot named Bholanath, mentions a *banda ail*, or raised divisional embankment. But there may be three or four such in any plain.

" Agreements of Surroop and Sheik Madhub, in favor of certain Boses, mention Joahdangah, Tarabheel, and Lacbladangah. These kubooleuts are of late years, 1257 and 1260.

" Almost the last documents are heaps of *jumma wasil bakee* or collection papers, showing the names of ryots and the amount of their jummas, but of course not showing the exact situation of the lands held by such ryots.

" The oral evidence is very abundant. In round numbers there are sixty witnesses on either side. Some of the witnesses for the plaintiff are the ryots said to have been ejected in 1261. Their evidence is generally to the effect that the eight dangahs sued for belong to Ghagha, and four to Dhomitollah; that dispossession took place when Baneekant Roy had the lease in the minority of the plaintiff, by the conduct of some burgadars (or cultivators who take half the crop for their trouble, and give the other half to the owner) refusing to give the regular one-half of the crop; that no attention was paid by the leaseholder to this at the time; that Rasmonee has no land to the west or south of the khal; that the defendant has taken the marsh of Chundaldighee besides, at one end of the property in dispute, and that the final dispossession took place in 1261, when the agent of the plaintiff said that they had enough of the criminal, and would try the civil court.

" The oral evidence for the defendant is that the land belongs to Barparah and other villages; that a measurement commenced once was stopped at the representation of the ryots; that within the land claimed by the plaintiff are other lands belonging to several small talookdars and to holders of rent-free lands; that such parties have about 150 beegahs between them and Rasmonee about 700 beegahs, of which sum 500 beegahs may be under cultivation; that amongst the rent-free holders are the Bhuttacharjee family, to whom allusion has been made repeatedly in the written documents, that there has been no dispossession at various times as stated by the plaintiff; that the small khal, known as Ghagha, and running parallel to the small *ail* and is filling up; that the khal Foloibund belongs to Barparah, but that the land in dispute belongs to three villages of the defendants, in the fashion designated in this part of the country as *pitalgola*, *i. e.* a sort of mosaic made by the lands of different villages crossing and interlacing

with each other in one and the same village; that the land is often under water, and that the small *ail* and the Ghagha khal are, and have always been the boundaries. Some of these witnesses are respectable talookdars, some are ameens who went to measure the land, some are ryots of defendants, and some are independent persons, or hold land under the plaintiff elsewhere.

"Some of this last evidence appears to me very fair and trustworthy, and besides the oral and documentary evidence for the defendant, a number of small talookdars and rent-free holders have come forward in defence of their rights with agreements, decisions of the courts, deeds of sale, or divisions of shares, or compromised and oral evidence, besides in which there is mention of several of the *dangahs* now claimed. I think it unnecessary to review this further evidence in detail, though the attention of the court has been fully given to it. The plaintiff replied in some instances, that the land of these parties was really not claimed by him, or was not in the disputed portion, but why, if that were the case, the parties should take the trouble to come forward, is not easy to see. In some instances, too, the land appears identical with some of the *dangahs* claimed, and that all these persons have been instigated by the defendant to come forward and back her claim, I think is very improbable. The parties are respectable, and the imputation rests on assertion above.

"The case occupied the attention of the court for two entire days and a half. The whole of the documents were carefully inspected, and have been analysed as above. Some of the papers are trivial, or do not bear on the point at issue, except by inferences exceedingly strained; as such, they have been alluded to simply to show that they have been laid before the court; others again, are papers from the zemindaree records of either party, many, to all appearance, not forged, good evidence till rebutted by more powerful evidence, but entirely contradictory of each other, and requiring some independent or corroborative proof before they can be accepted as conclusive.

"In such a case as this, a great deal must depend on reasonable presumption and inference. Now the presumption would be, that a khal were the more natural and proper boundary of two estates or pergunnahs. But it has been clearly shown in the course of the evidence, that the defendant has land on both sides of the khal, whether that land be the land in dispute or not. Again as to these *dangahs* or lands gradually rising out of the marsh by alluvion or accretion, nothing is more likely than that they should be undefined in extent, and designated by various names. There may be *dangahs* as named in the zemindaree records of both pergunnahs, and yet the land now

claimed as part of these *dangahs* must belong exclusively to one party or the other. Mere mention of such and such a *dangah* in one measurement paper or other will not show that the *dangah* is situated within the *khal*, and the *ail* as marked in the maps of both parties, and nowhere else. Dhobeel or Hinga may be the term for land becoming culturable inside the disputed portion, or outside of it, but, after the most careful consideration, I do not feel that the plaintiff has made out his claim as a plaintiff in such a case should do, by a title superior to that of the defendant, and I have, therefore, to record my opinion that his suit should be dismissed, basing the order of the dismissal mainly on the generally superior nature of the evidence for the defence, both as to title and continuous unbroken possession on the extremely lame and improbable account which the plaintiff gives of the successive acts by which he has said to have been dispossessed, viz., on the improbability of either Baneekant Roy or Mr. Dunlop quietly submitting, at different epochs, to the injury said to have been done to them by the defendants, and on the very weak evidence as to the most recent dispossession in 1261 (1854) when five ryots could be found to come forward and speak to a dispossession which must have been, by their own showing, one from at least 300 beegahs of land on the violent suspicion induced by the finding of the leaf in the measurement papers of 1216, with the unborn plaintiff's name written on it, is a matter, which if it did not afford grounds for a prosecution for forgery, is yet amply sufficient to cast *great discredit* on the suit; on the evidence of so many respectable talookdars and rent-free holders, who have come forward, at considerable expense and trouble to themselves, to protect their own rights and to aid the defendant, on the discrepancy in the evidence of one Aheb, mentioned before, who in December 1843, gave distinct evidence in another suit, that the khal belonged to Mokimpore, and the land of Mokimpore extended to both sides of the khal, and that an embankment was the boundary, and who now swears on the contrary, that the boundary is the khal; on similar evidence of Chirag Alee, who deposed to that effect also in 1843, but who since demised; on the telling fact noticed in the review of the evidence, that Bholanath Shome entered as a possessor of some of the land in the plaintiff's measurements of 1230, did not obtain possession until six years afterwards, which fact throws discredit on that whole bundle of papers; on the facts disclosed by several ineffectual attempts at resumption, all corroborative of the defendants and the rent-free holder's rights; on the great length of time which the plaintiff has been in suing, and which, though it may not bar his right to sue, cannot possibly be permitted to exalt the value of his written and oral evidence; on the careful omission of

plaintiff, when filling leaves from certain measurement papers in court, to file the very leaves which would have shown that land on the west and south and east and north, belonged to defendant, which omission was supplied in court, on sundry decrees obtained at other times between third parties corroborative of the defendant's pleas, which decrees could not be collusive; and on the broad principle of law, that in such a case of conflicting evidence, contradictory statements, and inconclusive proofs, the answering party stands on ground of superiority, and that possession not shown to be forcible or fraudulent, is nine points of the law. The suit is accordingly dismissed with costs. The defendant to get all her costs.

"There is only one other point left unnoticed in the above review, which is the application of the plaintiff to have an ameen sent to the spot, which application the court refused to comply with. For this reason, that there is no doubt as to the position of the khal or of the *ail*, or of the situation of either alleged boundary. The maps of both parties quite tally. Had the case been that the *ail* was practically the khal, or the khal the *ail*, or that one party or other were endeavouring to mislead the court as to the exact position of these features in the landscape, an ameen, going to the spot, might have thrown some light on the subject. But the point is, to which estate do certain lands very clearly defined belong? This is a matter for independent documentary evidence, such as has been laid before the court in abundance, and not for oral evidence of witnesses, half a dozen clamorous on one side, and half a dozen on the other. In fact, unless an ameen, in such a case, were to have the judicial office delegated to him, with all the written evidence, it is difficult to see what else he could do, but give a vague and inconclusive report, or a one-sided one, to be followed by complaints from one party or other, and prays for the deputation of a second ameen. The request was nothing but an example of the pernicious practice of sending ameens to complicate the case, or in the vain hope, that the labor or the judicial duty of the court would be in some way lessened. As such, it was refused, and there is an example evidence to decide the case without it. Indeed, nothing can now be said to be wanting on one side or on the other."

JUDGMENT.

From this decision, the plaintiff, Rajah Prosonnonath Roy, has appealed, and we observe from the map of the locality on record, that the dispute is for the possession of a tract of elevated land lying directly to the south and west of a khal called the Foloibund, upon the north and east of which is the estate of the defendant, who has also possession of the land in dispute, while the object of the plain-

tiff in this action has been to keep the defendant to that further side of the khal as the boundary of his zemindary, and to recover possession of all the lands upon the south and east as belonging to his estate which adjoins the lands he sues for.

In order to establish his claim, the plaintiff has filed certain measurement chittas of the years 1179, 1216 and 1230 B. S., in which the lands are assumed to be recorded under certain denominations, which it is alleged, identify the lands in suit as lands belonging to the plaintiff's property.

Of these measurement papers, however, we observe that the judge has considered only those recorded in the year 1179, to be at all reliable. Those of 1216 having been recorded in the name of the present plaintiff, although the plaintiff was not at the time in existence, his birth dating from 1230, or some four years afterwards, consequently the proof, which plaintiff assumed he could produce, of the record of these lands in consecutive measurements of his estate, from 1179 to 1230, altogether breaks down, and in fact the learned Advocate General who appeared for the plaintiff, appellant, admitted to us, that he could only submit in support of the measurement papers of 1179, some kubooleuts of ryots who had attorned to the plaintiff or his ancestor, in which the localities now disputed were mentioned, and the oral evidence of witnesses, who took upon themselves in their depositions to declare, that the lands now claimed bore the distinguishing names recorded in their papers, and that they belonged to the plaintiff's estates. Evidence of this nature we consider far from sufficient to establish a title to the lands, and looking at the reasons and conclusions of the judge, which have evidently been reached after a very careful consideration of every item of proof submitted by both parties, we see no reasonable ground for doubting the justice of his decision, and dismiss this appeal.

A point independent of the merits of the case, as decided by the judge, has been pleaded before us in objection to the amount of costs, with which plaintiff has been saddled in favor of a number of the defendants, who were necessarily made parties to the suit under the following circumstances.

The action was originally brought against the defendant, Rasmonee, as proprietor of the Zamin, Pergunnah Mokimpore, with whom the plaintiff considered himself at variance for possession of the lands in suit, but as it was represented to the court of first instance, that the lands sued for were in the actual possession of seventeen other persons, two of whom held a portion in rent-free tenure, and the others as huzooree talookdars, and that the suit could not be properly tried in their absence, these persons were all made defendants by a supplemental plaint, and their answers taken.

On deciding the case adverse to the plaintiff, the costs of each of these persons has been calculated at the rate allowable upon the full value of the suit. Thus as the suit was above 80,000 Rs., the sum of 1,000 rupees has been awarded to each of the defendants.

To this rate of costs the plaintiff demurs, and the learned Advocate General argues, that although the principal defendant, Rasmonee, cannot be denied costs at the full amount of the claim, the other defendants whose interests are confined to the small portion of land comprised in the talook of each, cannot be entitled to receive costs commensurate with the entire value of the whole interest at stake; that with regard to them, the scale of costs should be in proportion to the value of the lands they hold; and that where two or more of them have filed similar answers, and employed a joint vakeel, the costs of one pleader only should be allowed to them.

As the facts advanced by the learned Advocate General have not been disputed by the respondents, and as we consider there is much reason in the objection set before us, we deem it right to alter the scale of costs awarded by the lower court in the following manner.

The costs of the principal defendant, Rasmonee, will be as awarded, but those of the other defendants must be calculated upon the following principle, namely, that each holder of rent-free lands will receive his costs at the rate allowable for eighteen times the value of his rental, and the independent tolookdars at the rate to which they would be entitled, if sued against, namely, at the value of three times the sudder jumma of their lands, and such of the defendants as have filed answers to the same purport, and have employed one vakeel, the costs as of one defendant will be given to them.

With this modification of the judge's decree, and with costs of this appeal in proportion to the reduction of the total amount decreed against the plaintiff, we confirm the decision of the lower court.

THE 16TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 505 of 1858.

Regular appeal from the decision of Sreenath Biddyabageesh, Principal Sudder Ameen of Backergunge, passed on the 6th March 1858.

Kistomohun Ghose and another, (Defendants,) *Appellants,*

versus

Moonshee Mohamed Abbasun Chowdhree and others, (Plaintiffs,) *Respondents.*

Baboos Sumbhoonath Pundit and *Dwarkanath Mitter*, for appellants.

Baboos Kishenkishore Ghose, Ramapersaud Roy, and *Kally Mohun Doss* and *Mr. Allan*, for respondents.

Suit laid at Co.'s Rs. 9,746-7.

Held, first, that general limitation cannot be pleaded in support of a deed which is impugned as fraudulent against creditors. Held 2nd, that the evidence proved the beneficial interests in the property to be vested in the judgment debtors, and that the property was therefore liable for their debts.

THE object of this suit was to set at rest a question of title to property, which the plaintiff had attached in execution of decree, as belonging to his judgment debtor, under a sale from one Ramkanye, nominally in favor of appellants before us, but really in favor of the judgment debtors.

The averment was, that the property in question at one time admittedly belonged to the judgment debtors of the plaintiff, and after being sold in satisfaction of a decree, was purchased *bonâ fide* by Ramkanye, who then re-sold the lands to the judgment debtors in the name of third parties, and the plaintiff claims to have the property recognised as belonging to his debtors, and available for the realization of his decree.

The defence set up was, that the sale by Ramkanye to the third parties, the appellants, was a *bonâ fide* sale, and had vested no interests in the judgment debtors of the plaintiff.

The first point urged was, that as the appellants purchased from Ramkanye in 1251 B. S., limitations now barred any enquiry into the validity of a title acquired by them so long ago. This point in bar was overruled by the court below, who held, that plaintiffs' cause of action only accrued to him when the court in execution of his decree refused to recognize the property as the property of his debtors.

Upon the merits, the court below held, that the property was shewn to be the property of the debtors, and liable to sale in satisfaction of the plaintiff's decree.

In appeal, the plea of limitation is again raised, but we consider that in a case of this sort, no point of limitation can be determined, until the merits of the case have been ascertained.

On the merits, the appellants' pleader has argued, that as the sale which is now disputed was effected in 1251, while the suit of plaintiff was not instituted until 1257, and decreed in 1258, there

could be no ostensible object for the debtors wishing at that time to conceal their purchase, there is, therefore, no *primâ facie* ground for presuming, they so acted, and that consequently, the entire *onus* of proving, that the sale and purchase were made with fraudulent intent falls upon the plaintiff, and that appellants have had no case made out against them.

In reply to this argument, we observe, that the debtors and the appellants stand in the position of very near connection to each other, one being the father-in-law, and the other the uncle of the appellant, and that their is no denial of the assertion made by the plaintiff; that at the time of sale, the debtors had large liabilities against them in the shape of decrees and other debts. Had this been denied, the plaintiff might have been required to show, that such reasonable grounds for fraudulent concealment on their part existed, but no such denial was tendered, and the appellants were, therefore, required to prove the *bonâ fide* acquisition of the title set up by them.

There is, however, the evidence of very respectable witnesses to depose to the collections being made by the gomashtahs of the Roys, the debtor in question, on their possession of the property in the exact proportion in which they formerly held it, while we agree with the lower court, that the evidence of title tendered by appellants, and payment of the consideration is not of a nature to satisfy the court that they were ever the real purchasers. We dismiss this appeal with costs.

THE 30TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, Esqs., Judges.

Case No. 499 of 1858.

Regular appeal from the decision of Mr. E. Lautour, Judge of 24-Pergunnahs, dated the 4th June 1858.

Saroda Soonderee Debbea, and others, (Plaintiffs,) *Appellants,*

versus

Mussamut Kishen Kaminee Dassea and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose, Aushootosh Chatterjee and *Moonshee Ameer Ally*, for appellants.

Baboos Dwarkanath Mitter, Sreenath Doss, Ramapersaud Roy, Sumbhoonath Pundit and *Chundernath Chatterjee*, for respondents.

Suit laid at Co.'s Rs. 25,000.

Held, that if the owner of an estate with a limited area in the Sunderbuns transgresses

PLAINTIFFS, Womatara Debea, Saroda Soonderee Debea and others, sue Kishen Kaminee, Woomasoonderee Dassee and others, grantees of the Soonderbuns, lots 30, 32, and 33, the Commissioner of the Soonderbuns on the part of government, and Hurrischunder Dutt, adminis-

those limits and cultivates lands which, under the common law of the country recognised by statute belongs to government, he cannot, as against government claim a right to the settlement of those lands as towfeer, which he has cultivated without the leave and license of government, the zemindar; if the government, the zemindar, thinks fit to settle them with another party it is quite at liberty so to do, and that power is not restricted by the fact that the party who has cultivated the land has expended money in the cultivation of them.

Suit dismissed with costs.

trator to the estate of the minor claimants of the lands, as Chukdars for possession of 5,000, of which they have been illegally dispossessed by government.

Plaintiffs allege, that the deceased Ramsaghur Mitter, ancestor of the Chukdar defendants, under color of a lease dated 12th Bysack, 1227 B. S., said to have been obtained from Sunkoree Dassee, zemindar of Mouzah Khurreebheel, secured possession of two chucks with separate boundaries, containing within them an area of 1002 beegahs; that these lands were really a portion of the *jungleooree putitabadee* talook, Mouzah Shahazadpore belonging to them, and borne on the rent-roll of the collectorate of the 24-Pergunnahs; that agreeably to a petition presented by Prankishen Dutt and others, former proprietors of the said talook, an order was issued from the Sconderbun Commissioner's office to the aforesaid Mitter, prohibiting him from cultivating the said lands, inasmuch as they appertained to Shahazadpore; that afterwards a suit under Regulation XV. of 1824 was instituted, and on the 18th March 1826 A. D., or 1233 B. Æ., an order was passed in favor of the zemindar of Shahazadpore; that the Chukladar then owner of the former talookdar of Shahazadpore for possession of the same, and Radhakishen Dutt, the ancestor of Kishen Kaminee Dassea, and other defendants put in a claim to the land as appertaining to lots 30, 32, and 33 of the Soonderbuns; that the judge dismissed the Chukdar's suit on the 30th December 1831, holding that the land belonged to Shahazadpore; that on appeal to the Sudder on 1st February 1837, that Court modified the judge's order, directed that the Chuckdar should remain in possession and pay rents to the talookdar of Shahazadpore; that the Dutt talookdars remained in possession and sold their right to the plaintiffs, who collected rents from the Chukdars according to the Chukdars' ikrarnamah; that subsequently, Shahazadpore was surveyed in plaintiff's absence, and excess lands were discovered; that the defendants, Kishen Kaminee Dassea and others, heirs of Radhakisshen Dutt, filed a petition before the survey deputy collector, and claiming the lands as part of their Soonderbun grant. That on the 17th Kartick, 1258 B. Æ., or in October 1851, the deputy collector after proceeding to the spot, found that the lands belonged to plaintiff's talook, and passed an award in their favor, which was affirmed by the Superintendent of Survey on the 25th June 1852, and that the defendants then appealed to the Commissioner, who on the 29th April 1853, in their, plaintiffs' absence, declared that the excess or towfeer lands should be incorporated with the lots 30, 32, and 33, that subsequently proceedings under Act IV. of 1840, were instituted for the time, and the magistrate awarded to them (plaintiffs) possession, but on appeal the Session Judge relying on the order passed by the Commissioner on the 23rd Kartick 1961, or October 1854, awarded possession to defendants, since which date

plaintiffs have been out of possession. That as the Chuckdars have been in possession of the lands under the decree of the Sudder, paying rents to them, plaintiffs, since 1837 or 1243, and as the Chuckdar's pottah bears date some years prior to that date, and the lands have been incorporated with their plaintiffs' talook, and possession of the same has been held by them ever since the order of the Sudder Court, they should have been retained in possession by the Commissioner of the Soonderbuns and the Session Judge, as entitled to the land by right under the Sudder Court's decree; moreover, though their *dowl* only mentions 7,389 as appertaining to the talook Shahazadpore, still as the jungle and forest lands without the *dowl* were reclaimed at the expense of the talookdars, and have always been in their possession, and they are under the law of the country entitled to retain possession of them as towfeer, and a settlement should have been made with them. That on every ground they are entitled to the possession of the land in dispute, which they now pray for with mesne profits from the date of dispossession.

The principal defendants, the Soonderbuns grantees of lots 30, 32, and 33, in their answer deny the plaintiffs' claim to the land in dispute, claim it as belonging to the lot No. 32, which was granted to them with other lands on the 26th June 1830=23rd Maugh 1236, and as having been always in their possession as grantees of the government, under that grant, and allege that the lands in dispute are without the fixed area to which alone plaintiffs are entitled under their *dowl*. The defendant, Hurrischunder, on behalf of the minor Chuckdars in his answer also denies the right of the plaintiffs to the lands in suit.

The Soonderbun Commissioner, on the part of government pleads, that the plaintiffs have all the land to which they are entitled under their *dowl;* that government is proprietor of all lands in the Soonderbuns, and consequently can settle the lands not included within the pottah of other parties with whomsoever it pleases; that in this case, they have settled the lands resumed by the special Commissioner's decree, with the abadkar of lots 30, 32, and 33, and plaintiffs have no claim to them, nor any title whatsoever.

The judge, on a consideration of all the circumstances of the case, was of opinion, that the plaintiffs were in possession of the quantity of lands to which they were entitled under their *dowl;* that there was an adverse possession to them in the Soonderbuns lotdars by prescription, and that the plaintiffs are altogether without title as without time, and that there is no foundation whatever upon which they can claim these lands as towfeer; he, therefore, dismissed this suit, with all costs payable by them.

From the decision of the judge an appeal has now been preferred to this Court by the plaintiffs below; they urge, that they are entitled

to the lands claimed by them under the decree of the Sudder Court, dated 1st February 1837, under which they have ever since held possession, and that also, under the common law of the country, they are entitled to the possession of the lands, as of the towfeer of talook Shahazadpore, though the *dowl* only specifies 7,389 beegah, and consequently that possession of these lands should be awarded them, and a settlement if necessary made by government with them, and not with other parties.

It appears that in the year 1227, B. Œ. or 1820, the then zemindar of Mouzah Kurbeelah granted a pottah of 2 chucks identical with the land now in dispute to the ancestor of the defendant's chuckdars now before the Court; the former proprietor of the talook Shahazadpore, which is now owned by the plaintiffs, objected claiming the lands as theirs, a suit was eventually instituted by the chuckdars, in the course of which, a petition was presented by the ancestor of the defendants, the lease-holder of lots 30, 32, and 33, and on the 1st February 1837 a decree was passed by this Court by which the chuckdars were retained in possession, but were directed to pay their rents to the talookdar of Shahazadpore, and in accordance with the decision of this Court the parties acted for several years.

Now the first observation which strikes the Court to make, is this, that that suit was one simply between a party claiming under the talookdar of Kurbeelah, and the talookdar of Shahazadpore; as between them and their privies, the suit was final and conclusive, but it could not affect the right of third parties who were not then regularly before the court, it follows, that in this suit in which the former defendants claim to hold as lease-holders under government, the proprietor of Soonderbuns, the plaintiffs must rely on their own title deeds, and any decision passed to which government was not a party, cannot determine the question now before the Court.

What then are the title deeds on which the plaintiffs rely; it appears that they held a *dowl* which specifies the particular quantity of land belonging to talook Shahazadpore to be 7,389 beegahs; they admit that they are in possession of that quantity; but allege that the lands now in dispute are towfeer of Shahazadpore, and were in possession of the former owners of that talook, and were cleared by them at their expense. That, consequently, they are entitled to the possession of them, and a settlement for them with government in preference to any other party.

Admitting the facts as pleaded by the plaintiffs, we cannot admit the inference drawn from them; but we are of opinion, that they indicate no title on the plaintiffs to the lands in dispute; the lands of the talook Shahazadpore have all along been of a defined area to that extent and no further, consequently, the right of these talookdars

extended; if they, overlooking the limited nature of their own rights, extended their cultivation beyond the limits of their talook, they did so at their own risk, and such an act, whether attended with outlay of money on their part or not, could not, as or against a government, a neighbouring proprietor, give them any title to the possession of the lands usurped by them.

It is true, as was pleaded by the vakeel of the plaintiffs, appellants, that it is customary for government in the Soonderbuns to settle with the parties who, without title, have cleared the lands; doubtless it is so, and the custom is found on considerations of equity, but if government, as proprietor, for reasons known to itself, think fit to lease the lands to others, we cannot allow consideration of equity to step in and interfere with the cardinal rule of the law of property, which allows a party to dispose of it as he pleases, and which refuses to compel him to recognise parties, who have usurped his lands, and attempted to make themselves his tenants by unauthorised acts of their own.

On this view, even admitting the plaintiffs' facts, they have no *locus standi* in court; we observe, moreover, that the fact of the clearance of the lands at the plaintiffs' expenses, is distinctly traversed by the defendants, the grantee of lots 30, 32 and 33, but it is unnecessary to pursue this point further.

We dismiss the appeal with costs.

THE 30TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 501 of 1858.

Regular appeal from the decision of Roy Ramlochun Ghose, Principal Sudder Ameen of Nuddea, dated the 24th June 1858.

Behary Lall Roy and others, (Defendants,) *Appellants,*

versus

Essanchunder Roy and others, (Plaintiffs,) *Respondents.*

Baboos Chundernath Chatterjee, Kishenkishore Ghose, and *Baneymadhub Banerjee,* for appellants.

Mr. R. T. Allan and *Baboos Sumbhoonath Pundit,* and *Sreenath Doss,* for respondents.

Suit laid at Co.'s Rs. 9,902-15-5.

Held in a suit for possession and mesne profits on an allegation of plaintiff having been kept out of possession by defendant, not-

THE plaint sets forth that mouzah Soudakurpore was an estate on the Nuddea rent-roll; that plaintiffs hold 5*as.* 2*c.* 1*k.* share in it, and bought up certain putnee leases within it in the name of one Rajib Lochun; that the plaintiffs farmed the lands, which they thus acquired to George Rogers and T. Ryson, from 1251 to 1255 B. S.; that Kesubchunder Roy purchased the Soudakurpore factory

withstanding a decree under Act IV. of 1840 in plaintiff's favor, that plaintiff's claim was proved ;— possession was accordingly decreed, but mesne profits were awarded only from date of suit.

from Rogers and Ryson in 1251 B. S., in the name of appellant, Behary Lall, and took over the leases held by those gentlemen, and himself held possession of the lands farmed to them ; that Kesubchunder, however, would not pay plaintiffs the rent due on account of the lands so held by him ; that plaintiffs sued Kesubchunder for some of the rents thus due, and attached his property, but Kesubchunder, by a suit under Reg. V. of 1812, obtained the release of the attached property ; that the plaintiffs again sued for the rents of another portion of the property as for the years 1253-54, and again for rents due for 1253 to 1255. The first two cases were originally decreed, but remanded on appeal ; and the third dismissed. It is added, that in the meantime, Rajib Lochun, in whose name plaintiffs had purchased the lands, and in whose name they had sued, colluded with Kesubchunder Roy, and caused the three cases alluded to, to be struck off for default. The plaintiff also brought a case under Act IV. of 1840, and got a decree on the 23rd of August 1850, but before it was executed, Kesubchunder had taken off the indigo crops ; the plaintiffs, however, getting from the darogah charged with the execution of the decree, a formal possession of the land ; but that this possession was only formal, and was shortly afterwards again interfered with by Kesubchunder, and plaintiffs were kept out of possession of 684 beegahs &c. &c. by Kesubchunder cultivating indigo and linseed on 568 beegahs, and letting the rest. They, therefore, sued defendant Behary Lall as representing the heirs of Kesubchunder and for himself for possession of the 684 beegahs, also for mesne profits for 8 years, at 1 Re. per beegah, with interest, being a total of 9,902-15-5.

Rajib Lochun, whom the plaintiffs had made a defendant, denied, that he had ever had any concern with the lands in suit, and added that they were plaintiffs' ; that plaintiff had all along held the right of, and the possession of them, Behary Lall and others being really indebted to plaintiffs for the rent.

The defendant Behary Lall denied ever having dispossessed plaintiff ; he pleaded that Kesubchunder was in possession from 1251 to 1255 B. S., and after that plaintiff was himself in possession. Behary Lall also pleaded, that he held a putnee lease of 3 annas, 19 gundahs, 2c. of the mehal from the proprietors, Rajnarain and Sreenath, and paid rent to them.

The lower court, after overruling certain pleas in bar relative to the multifariousness of the suit, put as the issues to be adjudicated, whether plaintiffs had any interest in the disputed land, and whether they were dispossessed in 1256 B. S., also, whether the amount of wasilat claimed by the plaintiff was the proper amount.

The lower court held, that plaintiff had the interest which they alleged in the land in suit ; and that it was proved by the plaintiff's witnesses, by one witness, Doorga Sunker, who had been called by

both parties, and by the report of an ameen, that plaintiff had been dispossessed of 639 beegahs, 4*c.*, 12*ch.* in 1256, by Kesubchunder Roy; and that the plaintiffs had not proved the amount of wasilat claimed by them. The principal sudder ameen accordingly decreed possession of the lands to plaintiff to the extent of their alleged proprietary right; and that plaintiffs should receive mesne profits according to the amount which might be ascertained in execution from Behary Lall; and costs from that defendant, who should also pay the costs of the other defendants.

The defendant, Behary Lall, has appealed to this Court, urging, *firstly*, that as the Act IV. decree awarded possession of the lands in suit to Rajib Lochun, and he, according to that decree, had obtained possession through the darogah in execution, the decree of the principal sudder ameen ruling that this defendant had held possession could not be upheld. *Secondly*, that plaintiff's case of alleged dispossession had not been proved by the evidence, and *thirdly*, that the principal sudder ameen himself held that the plaintiff failed to prove the amount of wasilat he claimed, and yet the mesne profits were decreed to plaintiffs, subject to their being ascertained in execution. It was added, on the appeal coming before us, that at any rate the wasilat should only be decreed from date of suit.

JUDGMENT.

After a perusal of the evidence on the record, we are clearly of opinion that Kesubchunder Roy, whose estate is now represented by Behary Lall Roy, as the guardian of the minor sons of Kesubchunder Roy, kept plaintiff out of real and actual possession of the lands in suit, of which plaintiffs were purchasers in the name of Rajib Lochun. It is true that there was an order for possession under the Act IV. decree to Rajib Lochun, and that the form of giving possession was gone through by the darogah, but the whole evidence is to the effect that Kesubchunder Roy still kept plaintiffs out of the quiet enjoyment of the land so decreed. On the other hand it is clear, that it was only by this present suit in 1857, that plaintiffs took any proper steps to obtain possession under the order in execution of the Act IV. decree of 1850, had failed to obtain it for them, and that in the interval, they did not sue as they should have done.

On the whole, we think it right that plaintiff should have a decree for the possession of the lands and mesne profits from the date of suit, the amount to be ascertained in execution; and the costs to be charged against the estate of Kesubchunder Roy, represented by Behary Lall, defendant.

We accordingly modify the judgment of the principal sudder ameen in the above manner, with costs in proportion.

THE 30TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 551 of 1858.

Regular appeal from the decision of Baboo Punchanund Banerjee, Principal Sudder Ameen of Rajshahye, dated the 19th April 1858.

Eshanchunder Lahooree, (Plaintiff,) *Appellant,*

versus

Taramonee Dassea and others, (Defendants,) *Respondents.*

Moulvee Murhumut Hossein, for appellant.

Baboo Poorun Chunder Roy, for respondent.

Suit laid at Co.'s Rs. 5,390-14-1.

Held, that when a party, a putneedar, has bound himself to grant a durputnee lease, and has received full consideration for the same, and the only thing remaining to be done is for him to execute the lease, and to give possession; it is not competent to him to grant a farming lease of that property; every thing having been done by the durputneedar that it was necessary for him to do, the Court will consider that as done, which was agreed to be done by the putneedar, and will hold any subsequent lease granted by him as fraudulent and void as against the durputneedar.

Held also, on the evidence on the record, the court disbelieve the *bonâ fide* execution of the farming lease set up by

PLAINTIFF, Eshanchunder Lahoree sues Taramonee Dassea, putneedar, the widow of Kassinath Shaha and Alopa Burmony, widow of Wobootur Sing, the alleged durputneedar, for possession under a farming lease of Neej Boalleah, in Turuf Boalleah, from which she has been unjustly ousted.

Plaintiff alleges, that he obtained on the 22nd Jeit 1262 B. Œ, from Taramonee Dassea, defendant, putneedar, an ijarah lease of Neej Boalleah and other villages for seven years, from 1262 to 1268 B. S., at a jumma of Co.'s Rs. 1858, giving Mr. Warner, of Boalleah factory, as his security, and obtained a pottah and amulnamah or deed of possession for the same; that subsequently, Wobootur Sing commenced a quarrel with him, by alleging that he had obtained a durputnee lease of the above villages from the durputneedar in the name of his wife Alopa Burmony, and caused petitions to be preferred to the magistrate, who eventually brought the matter under Act IV. of 1840, making the aforesaid durputneedar the first party, and plaintiff the second party; that the aforesaid Burmony filed a durputnee pottah and amulnamah, bearing the seal and signature of the putneedar, defendant, the former dated 14th Assar 1262 B. Œ., and the latter dated 13th Assar 1262 B. Œ.; that the magistrate being satisfied that he, plaintiff, had enjoyed possession of the said mehals from a period antecedent to the date of the pottah and amulnamah, filed by the said Burmony, upheld his, plaintiff's possession on the 27th September 1855; that on appeal the judge unjustly reversed the magistrate's order on the 22nd April 1856, and on the strength of this order, the defendant ousted him from his farm on the 24th Bysack 1263; that plaintiff consequently now sues to obtain possession of his farm.

The defendant, Taramonee Dassea, the putneedar, does not appear, but the durputneedar, Alopa Burmony, files an answer alleging that the plaintiff's claim is false; that Taramonee Dassea, the putneedar, defendant, agreed to grant to her a durputnee lease

at a yearly jumma of 1791 Rs. on the receipt of 3,300 as nuzzurana ; that accordingly, on the 19th Bysack 1262, she paid 2,000 Rs. in cash and 1,250 in Bank of Bengal notes, and 50 Rs. in cash on the 3rd Jeit, aggregating altogether 3,300, through her husband, in the presence of Hurrynath Shaha, Ramtunoo Lahooree, and others, to Kassinath Shaha, the husband of the aforesaid putneedar, who, on the 13th Assar, granted her an amulnamah or deed of possession; that subsequently having executed the durputnee kubooleut on the 14th Assar, she obtained possession on the 19th Assar; that subsequently she obtained a letter from the said Kassinath Shaha, directing the then ryots to pay the arrears of rent for 1261 B. Œ., and having procured a statement of the outstandings, bearing the signature of Nubcoomar Banerjee, the tehsildar of the mehal, she commenced her collection on the 4th Srabun 1262 B. Œ. ; that in the meantime, Mr. Warner, the superintendent of the Boalleah indigo factory, in collusion with Kassinath Shaha, the husband of the putneedar, defendant, fraudulently prepared an ijarah pottah in favour of plaintiff, a servant of the factory antedating it, and giving himself as security for the payment of the rent of the farm; that consequently, disputes arose, and eventually under the order of the Session Judge, reversing that of the magistrate, retained the defendant in just possession under her aforesaid durputnee lease, as she will in various ways prove to the court's satisfaction.

the plaintiff, appellant. Appeal dismissed, with costs.

The principal sudder ameen was of opinion, that the plaintiff had not established the *bonâ fide* existence of his farming lease on a date anterior to the durputnee, admittedly granted to the defendant, he in his judgment remarks, that the farming lease is not registered, and the durputnee lease, which is admitted to be *bonâ fide*, makes no mention of the form ; that, moreover, the husband of the putneedar gave the durputneedar an amulnamah on the ryots, which he would not have done had a farming lease then existed; that again, the parties live in the mehal, and it is impossible to believe, that the durputneedar could have been ignorant of the existence of the farming lease, had it existed, or that he would have paid the large sum of 3,300 for the durputnee lease without making any enquiry regarding the mehal; that the plaintiff has given no trustworthy evidence as to his possession under the farm; that the dakhillahs of the putneedar filed by the plaintiff, taken together with the other circumstances of the case, afford no satisfactory proof of plaintiff's *bonâ fide* possession as farmer, and in short, that it is notorious that the alleged farming lease of the plaintiff has been concocted in consequence of the putneedar having granted a durputnee lease to the defendant, by which the interest of the factory of Mr. Warner would materially suffer. The prin-

cipal sudder ameen, therefore, dismissed the plaintiff's suit, with costs.

An appeal has now been preferred by the plaintiff below against the decision of the principal sudder ameen, adverse to him. He urges, that from the evidence on the record, he is fully entitled to a decree in his favour; that evidence clearly establishing the fact of the existence of his lease at a time prior to the existence of the durputnee lease; that consequently, his farming lease should be upheld by the court.

The existence of the durputnee lease, its *bonâ fide* nature, and the payments of the full consideration money for the same, on dates previous to that on which the farming lease to the plaintiff was actually granted, are all pleaded by the defendant, and these facts have not been traversed by the plaintiff, who simply relies on the fact that the date of the farming lease was prior to that of the durputnee lease, as entitling him to possession of the lands covered by it.

Now the facts pleaded by the defendant have been proved to our satisfaction by the evidence of Kassinath Shaha, the husband of the putneedar; he deposes clearly to the execution of the durputnee lease and to the receipt of the consideration money alleged by the defendant to have been paid by her for the durputnee lease. He does not, it is true, mention the particular date on which the sums were received, but in the absence of any evidence to the contrary, we must presume that the money alleged and proved to have been paid was actually paid on the dates specified by the payee, defendant.

Such being the case, a legal question arises, whether after the agreement entered into by the putneedar to grant a durputnee lease to the defendant, and the receipt of the full consideration money for the same to her, it was competent to the putneedar to execute the farming lease in favour of the plaintiff. We are clearly of opinion, that she was not competent; the agreement had been entered into, every thing that it was necessary for the lessee under the agreement to do had been done by him, it only remains for the lessor to execute the farming lease, which was, it would seem, to carry with it the collection of past rents, and for the lessee to execute the counterpart kubooleut; under these circumstances the court considers, that as done, which the putneedar had bound herself to do, and holds that any subsequent act of the putneedar in the nature of a grant, without consideration interfering with the perfect performance of the previous agreement, is null and void, as being done in fraud of that agreement entered into by her *bonâ fide*. Under this view, the plaintiff in this case, though unable to sustain an action based on a fraudulent grant of the putneedar, may have his action against her for damages on account of any legal injury, which he may have suffered by the illegal act of the putneedar.

As, however, the case has not been decided on this point below, we proceed, though strictly speaking, it is unnecessary for us so to do, to notice the evidence or probabilities of the case, upon a consideration of which, looking only to the documents propounded by the parties, the principal sudder ameen arrived at a judgment unfavourable to the appellant.

We entirely concur in the opinion expressed by the principal sudder ameen as to the great improbability that a person like the defendant, living either on or close to the property which she was about to take in durputnee, would be ignorant of the existence of a farming lease over the property, if it existed *bonâ fide*, or that she would have paid a large consideration money for the durputnee lease without having first ascertained the state of the mehal about to be leased to her. Again, we think that the amulnamah granted by the husband of the putneedar to the defendant, on the ryots of the property, raises a *primâ facie* presumption, that the collections were to be made from the ryots direct, and that the farming lease did not then exist. It is true that on the theory of the plaintiff, the putneedar was acting in bad faith to the durputneedar concerning her farming lease, and consequently in furtherance of the fraud, the amulnamah would be to the ryots direct; this consideration rebuts the *primâ facie* presumption above alluded; but it leaves untouched the improbability we have alluded to above, an improbability which, considered together with the admitted *bonâ fide* nature of the durputnee lease, as far as the lessee is concerned, requires very strong evidence to displace.

Now, on turning to the plaintiff's evidence, we note that the deposition of Kassinath Shaha is that of a rogue in difficulty; he is unable to deny either the durputnee lease or the farming lease; he admits them both to be genuine, but as to the circumstances connected with them, his evidence from his position is not one on which we can place the slightest reliance.

On the oral evidence of Gooroochurn Sircar and Takoordas Haldar, as to the execution of the pottah on the 22nd Jeit 1262, and possession taken under it, unsupported, we place no reliance at all, and the same may be said as to the kubooleuts said to be executed by certain ryots. The only remaining evidence is afforded by three dakhillas signed by the putneedar, one for 50 Rs., dated 12th Assar 1262, one for 49, dated 11th Assar, and a third for 100 Rs., dated 15th Assar of the same year. The plaintiff, it would seem was, according to his own statement, dispossessed in Bysack 1263, and the durputnee lease was dated 14th Assin 1262. He is in possession of three receipts just covering the date on which the defendant's durputnee lease was executed, but of none for a period subsequent to that date and anterior to the date

of his dispossession. Looking to the dates which these receipts bear, and to the fraudulent conduct of the putneedar, whose seals and signature they bear throughout the transaction before the court, we are unable to infer from them the validity of the farming lease and possession under the same.

Altogether we are clearly of opinion with the principal sudder ameen, that the evidence adduced by the plaintiff is quite insufficient to establish the *bonâ fide* execution on the 22nd Jeit 1262 of the farming lease set up by him, and we, therefore, on this ground, as well as on the legal ground noticed above, affirm the decision of the lower court, and dismiss the appeal with costs.

THE 30TH MARCH 1861.

H. T. RAIKES, C. B. TREVOR and H. V. BAYLEY, ESQS., Judges.

Case No. 861 of 1860.

Special appeal from the decision of Mr. E. Lautour, Judge of 24-Pergunnahs, dated the 2nd March 1860, reversing a decree of the Collector of that district, dated 22nd December 1859.

Hullodhur Biswas, Tehsildar, on behalf of Chundeechurn Byragee, (Plaintiff,) *Appellant*,

versus

Moheshchunder Holdar, (Defendant,) *Respondent*.

Baboo Unnodapershad Banerjee, for appellant.

Baboo Tarucknath Sein, for respondent.

Held, that judgments passed in appeal by the zillah judges under Act X. of 1859, are open to special appeal.

SEVERAL petitions for the admission of special appeals from decisions passed by zillah judges in suits originally decided by the revenue authorities under Act X. of 1859, having been preferred to this court, and doubts being entertained whether such special appeals are admissible, the question was referred to a full bench for an authoritative decision on the point.

The government pleader, Baboo Ramapersaud Roy, appeared for the appellants in these cases, and argued that the legislature intended by the promulgation of Act X. of 1859, to get rid of the double litigation which prevailed under the old system, and instead of allowing a summary suit to be brought for casual arrears in the revenue courts, to be followed by a regular suit in the civil courts, to contest the award of the revenue authorities, has made all suits of this description cognizable by the revenue authorities only, as the court of first instance, with a right of appeal when the judgment of the revenue court was not made final, to the zillah judge or to the sudder court (see Section 160 of the Act), and that the procedure to be followed in the hearing and trial of such appeals is that prescribed for the hearing and trial of regular appeals in those courts (see Section 161), those appeals, therefore, should be regarded as any other regular appeals, and would as

such, be open to special appeal under the terms and provisions of Section 372 of Act VIII. of 1859.

Having very attentively considered the arguments adduced by Ramapersaud Roy, we are unanimously of opinion, that the sections referred to in Act X. of 1859, favors the construction contended for by the pleader, and that the judgments passed in appeal by the zillah judges are open to special appeal before this Court in the manner provided by Act VIII. of 1859.

In the first place we would observe, that Section 153, of Act X. of 1859, declares that in suits under clauses 4 and 7 of Section XXIII. and under Section XXIV. of the Act, tried and decided by a collector, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, the judgment of the collector shall be final, and not open to revision or appeal, unless the decision involves some question of right to enforce rents, or some question relating to a title to land.

It is afterwards provided by Section 160, that "in all suits "other than those in which when tried and decided by a collector "the judgment of the collector is declared to be final, or when "tried and decided by a deputy collector an appeal is allowed to "the collector, an appeal from the judgment of the collector or "deputy collector shall lie to the zillah judge, unless the amount "or value in dispute exceed five thousand rupees, in which case "the appeal shall lie to the Sudder Court." Hence we find that in all cases tried and decided by the collector or deputy collector, in which the decision of the collector is not final, provided the appeal is declared by Section 160 to be an appeal to the zillah judge or to the Sudder Court, as the case may be, according to the amount or value in dispute between the parties to the suit.

Then in Section 161, we find the rules laid down for the hearing and determining these appeals, and we are specifically told that "the "petition of appeal shall be written on the stamp paper prescribed for "appeals from the subordinate civil courts with reference to the "amount or value of the property involved in the appeal, and the rules "in force with regard to the time within which appeals from the de-"cisions of such courts may be received, and to the manner in which "such appeals are heard and determined, and to all proceedings "which may be had in respect of such appeals, shall be applicable to "appeals to the zillah judge or Sudder Court under this Act."

Now it has been rightly argued, we think, that these words are sufficient to show that the legislature intended that these appeals should be treated in *every* respect as regular appeals in the zillah or Sudder Courts, and that Act X. of 1859 having given the right of appeal to these courts intended to leave the courts to deal with the appeals according to their own forms and mode of procedure, and to

place no sort of restriction upon the action of the laws by which the decisions of those courts are ordinarily governed. It, therefore, naturally follows that as our new code of procedure Act VIII. of 1859, has enacted by Section 372 that "unless otherwise provided by any "law for the time being in force, a special appeal shall lie to the "Sudder Court from all decisions passed in regular appeal by the "courts subordinate to the Sudder Court." A special appeal will lie from the decisions of the zillah judges in appeals preferred to them under Act X. of 1859, to hold otherwise, would presume that Act X. of 1859 was intended to invest the subordinate civil courts with some new finalities as their appellate jurisdiction, and to restrict the ordinary power of this court, which we see no reason whatever to think, was contemplated by the legislature in framing the Act in question. We, therefore, determine, that subject to the provisions enjoined by Section 372, of Act VIII. of 1859, petitions of special appeals from decisions passed by the zillah judges in suits instituted under Act X. of 1859, can be heard and determined by the Sudder Court.

THE 2ND APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 569 of 1858.

Regular appeal from the decision of Major W. Agnew, Principal Assistant Commissioner of Gowalpara, dated the 30th June 1858.

Musstt. Dhunmonee Dabea, (Plaintiff,) *Appellant,*

versus

Hurkabuttee Jhanee and others, (Defendants,) *Respondents.*

Baboos Kishensukha Mookerjee and *Onookool Chunder Mookerjee,* for appellant.

Baboo Ramapersaud Roy and *Moonshee Ameer Ally,* for respondents.

Suit laid at Co.'s Rs. 21,017-2-5.

Held in accordance with the opinion arrived at by the lower court that the will propounded by the plaintiff was not proved, and consequently that her suit founded upon that will must be dismissed with costs.

PLAINTIFF, Dhunmonee Dabea, daughter of Pumman Jha, deceased, and wife of Luchmee Jha, and mother of Bechoo Jha, minor, sues Hurkabuttee Jhanee, the second wife of Pumman Jha and others for possession of half share of the estate of her father, Pumman Jha.

Plaintiff alleges that her father was married twice, first to Oograbuttee Dabea and secondly to Hurkabuttee Dabea, defendant; that he had two daughters by his first wife, plaintiff and Chummee Dabea; that on the 14th Maugh 1238 B. Œ., he devised to them by will duly executed his whole estate, both real and personal, in zillahs Purneah and Gowalparah, in equal shares, appointing at the same time their mother as their guardian till they reached majority, and in case of the mother's death, their grand-mother, Gurbani Dabea, who, as well as Hurkabuttee was to receive only a maintenance allowance out of the estate. That plaintiff and her sister remained under the guardianship of their mother till her death, and then came under that of their grand-mother till 1253, when she died, having personally appointed, by an ijazutnamah, dated 6th Maugh 1250 B. Œ., executed in conformity with the terms of the will, one Kurrum Jha as her successor to the guardianship of her grand-daughters; that subsequently plaintiff and her sister came of age, and their step-mother, Hurkabuttee, with a view to acquire their rights, commenced litigation with them and caused an Act IV. of 1840 suit to be instituted, which was decided in her favor; that subsequently the aforesaid Hurkabuttee has obtained a certificate of administration to the estate of their late father Pumman Jha, and by this and other means has obtained possession of all his property, she therefore brings the present action for an 8 annas share of the property of her late father (most of which is situated

within zillah Gowalparah), to which she is entitled under the will executed by him.

The defendant, Hurkabuttee, in her answer alleges, that the will propounded by the plaintiff is a forgery, and was never executed by her late husband, and that she is in possession of his estate as his widow, to which she is entitled by Hindoo law.

The Principal Assistant to the Commissioner in giving judgment remarks as follows: "I do not think that in my experience of civil judicature, I have ever met with a case in which the claim has been sought to be upheld on weaker proof than is adduced before me in this suit. The action is based on a will said to have been executed by Pummah Jha in favor of his two daughters, and by way of collateral proof, there is the ijazutamah written professedly in accordance with the term of the will, which is all the evidence, documentary or oral, adduced in support of the claim. The will I reject as spurious." The Principal Assistant then observes, that none of the attesting witnesses said to be still alive have been produced to authenticate it; that the signature on the will is in Bengali, a language foreign to the testator, and that it is strange that in so important a matter he should not have used his native Nagri; that the reason for the name of the testator being in Bengali, was probably that a forgery in that character would be more difficult of detection than one in Nagri, which could easily be collated with genuine signature of Pumman Jha; that in none of the suits between the parties, in the different courts, has the will or ijazutnamah ever been produced, and though apparently they were mentioned in a case before the deputy collector as may be seen from his roobookaree dated 20th March 1849, still the instruments were not filed before that officer, neither was Hurkabuttee a party to the suit, so that the plaintiffs could, unchallenged, advance any statement they pleased.

For all these reasons the Principal Assistant to the Commissioner dismissed the plaintiff's suit with costs, and she has now appealed to this Court from the judgment of the court below. She urges that she has produced the will and the ijazutnamah, and that it was the duty of the Court to procure the attendance of the witnesses named by her, and that even on the record as it now stands, she is entitled to a judgment of the Court in her favor.

It is needless for us to do more than to refer to the reasons of the Principal Assistant Commissioner for the dismissal of the case, and to add that we coincide with them entirely. The plaintiff, appellant, has taken no steps for procuring the attendance of the subscribing witnesses to the will propounded by her, and simply upon the production of two instruments, both of which are chal-

lenged by the opposite party, she requires a decree at our hands. We dismiss the appeal, with costs.

THE 8TH APRIL.1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 530 of 1858.

Regular appeal from the decision of Moulvie Mirza Mahomed Siddiq Khan, Principal Sudder Ameen of Sarun, dated the 22nd June 1858.

Bhootee Oojha and others, (Defendants,) *Appellants,*

versus

Banee Pershaud, (Plaintiff,) *Respondent.*

Baboos Kishenkishore Ghose and *Kishensukha Mookerjee,* for appellants.

Moonshee Ameer Ally, for respondent.

Suit laid at Co.'s Rs. 5,866-0-6.

Held upon proof of the registration of certain sunnuds so far back as 1795 and 1800 A. D., that the lands covered by them were lakhiraj before 1790, and that therefore, limitation would bar an action by one who had neglected to resume them for upwards of 12 years.

THE plaintiff in this suit is the proprietor of a Nizamut village called Nyagong, and his plaint sets forth that, having had disputes for some lands with a neighbouring proprietor, which terminated in his favor in 1850, the same person instigated his ryots on part of the lands to withhold their rent in 1257 Fuslee, obliging him to attach their crops; that the ryots then had recourse to the deputy collector to remove the attachment, and on pretence of the lands being lakhiraj and covered by sunnuds in their possession, procured the dismissal of plaintiff's claim for the arrears of rent. Plaintiff, therefore, brought this action to resume the lands amounting to 89 beegahs, and on the ground, that he had always received rent up to 1257 Fuslee, prayed for the reversal of the deputy collector's order, and to recover three years' rent due to him up to date of suit.

The defendants denied the payment of rent to plaintiff at any time, and pleaded a lakhiraj title to the lands in suit on several sunnuds, dating from 1171 to 1198 Fuslee, and on the ground of long and undisturbed possession for a series of years, pleaded limitation in bar of the plaintiff's claim.

The principal sudder ameen has decided, that by the evidence adduced, payment of rent was proved up to a recent period, and therefore held, limitation to be no bar to the action, and on the merits, he considered the sunnuds suspicious and untrustworthy, and decreed to plaintiff the right to resume and assess, but disallowed his claim for the rent of passed years.

From this judgment the defendants have appealed, and the first point raised by the pleader for our consideration is, the plea of limitation, which has been overruled by the court below.

It is admitted, that the plaintiff has no special right as an auction purchaser, and has held the estate since 1798 A. D.; we have, therefore, only to determine whether the defendants have established as a fact, that they or their predecessors were actually holding the lands in suit as rent-free at some period antecedent to 1790, so as to bring them within the category of lakhirajdars referred to in the Regulations of 1793, to whom the law of limitation can alone apply.

To establish this fact, we are shewn that sunnuds now filed by the defendants were registered in 1202 and 1207, which will correspond with the years 1795 and 1800, and although the quantity of land entered as contained in those grants is not equal to the quantity now held by the descendants of the grantees, it is quite probable that the full quantity actually possessed under the grants may have exceeded the quantity recorded in them, and we are not shown that the defendants have acquired the surplus under any other title. The only circumstance set forth by the other side to rebut the inference of the grants having been in existence from their respective dates is, that at the decennial settlement no land in Nyagong is exempted from the rent-roll as rent-free land, but this in itself is not sufficient to rebut the presumption of the existence of rent-free land as recorded in these sunnuds before the year 1790. The presumption, therefore, that arises from the registration of these grants is, that whether valid or invalid as grants of lands, they were at all events creations of lakhiraj tenures previous to the year 1790, and are, therefore, to be classified among the grants referred to in the Regulation of 1793, and as there is no reliable proof on the record from collection papers or other documents, that the defendants have ever paid rent to any one, these grants are sufficient to maintain a plea under the limitation law, against one who might have sued to resume them, but has neglected to do so for a period of 12 years. We, therefore, hold limitation to be now a bar to the present action, and reverse the judgment passed in favor of the plaintiff, with costs.

THE 15TH APRIL 1861.

G. LOCH and C. STEER, ESQS., Judges.

Case No. 39 of 1859.

Special appeal from the decision of Mr. A. Littledale, Judge of Nuddea, dated the 18th April 1859, reversing a decree of Baboo Kolodanund Mookerjee, Sudder Ameen of that district, dated the 29th June 1858.

Polin Chunder Gossain and others, (Defendants,) *Appellants,*

versus

Woomesh Chunder Roy and others, (Plaintiffs,) *Respondents.*

Baboos Kishenkishore Ghose and *Poorunchunder Roy*, for appellants.
Baboos Ramapersaud Roy and *Aushootosh Chatterjee*, for respondents.

On the point whether an alleged rent-free tenure was in existence as lakhiraj previous to December 1790, and if so, whether the zemindar's claim to resume is not barred by the general law of limitation as ruled in several decisions of this Court quoted in the above proceeding of the 6th August, the first court distinctly finds that the tenure was in existence as lakhiraj previous to 1790. The Judge however looking at certain decisions of the court, held that this fact was insufficient to establish the validity of the rent-free tenure, and therefore gave a decree for the plaintiff seeking to resume. Held, that the validity of the grant was not open to the Judge's consideration. He had merely to

THIS case was admitted to a review of judgment by Mr. G. Loch, on the 6th August 1860.

An application for the review of the judgment of this Court rejecting the petitioner's application for the admission of a special appeal on 22nd February 1860, is made on the following grounds. The plaintiff in this case, Woomesh Chunder Roy, a putneedar, sued to resume certain lands held by the defendant, petitioner, as lakhiraj. His claim was thrown out by the lower courts, and a special appeal was preferred, and, on the 10th June 1857, the case was remanded to determine whether the defendant's tenure originated before or after the 1st of December 1790. The lower courts have now held, that the defendants' title is invalid, but they acknowledge, the principal sudder ameen distinctly, and the Judge less clearly, that the land was held by the defendants' ancestors as lakhiraj, previous to the 1st December 1790. Such being the case, the counsel for the petitioner contends, that the usual law of limitation is applicable whether the title be good or bad. The zemindar was entitled to resume within twelve years of the decennial settlement, but failed to do so, and the auction purchaser from whom the plaintiff derives his title, was also entitled to question its validity within twelve years of his purchase, but abstained from doing so, and were the estate to be again sold for arrears of government revenue, the sale would again expose the petitioner's title to be called in question by the auction purchaser, at any time within 12 years of his purchase. But when the auction purchaser had failed to take advantage of this privilege, he was concluded by his own omission, and could not revive and confer a right on plaintiff, his putneedar, which he had himself lost by his own negligence. That the judge is wrong in the conclusion he has drawn, for he considers that plaintiff has a right to resume, because the defendants can shew no sunnud of date granted between the years 1765 to and 1790, nor prove possession previous to 1765, but as the lakhiraj was not created subsequent to December 1790,

determine whether the tenure was in existence before December 1790, and if it were, to apply the law of limitation. Held, that the purpose for which the suit was remanded, had been mistaken, and that the decisions cited by the Judge did not apply.

Considering therefore that the Zillah Judge and the principal sudder ameen both deemed that the tenure was in existence previous to December 1790, the Court held this suit to be barred by the law of limitation.

it cannot for the reasons above mentioned, be resumed; that the law of limitation is applicable to this case, may be gathered from the decision come to by the Privy Council in the case of the Raja of Burdwan *versus* the E. I. Company, in which it was held, that the respondent's right to resume certain lakhiraj lands held by the appellant was lost, owing to the lapse of sixty years, the period within which government claims might be instituted. Under the provisions of Regulation XIX. 1793, a Zemindar was competent to resume any lands granted as lakhiraj subsequent to 1790, and the provisions of section X. of that Regulation showed, that limitation did not apply to such cases, while section 6 of the same Regulation gave the Zemindar only right to resume, and such right required to be exercised within a period of 12 years from the time of the permanent settlement, and such was the decision come to by the Court in the case of Gungadhur Banerjea *versus* Satcowree Sircar and others, page 501, of the decisions for 1855.

Generally speaking, it appears to me that the distinction between resumption and assessment so clearly marked in the provisions of Regulation XIX. of 1793, is not always observed. The word "resumption," I apprehend, can properly be applied only to tenures coming under the purview of section X. of that Regulation, which were created subsequent to the 1st December 1790, and being considered part of the permanently settled estate, within which they were situated, were and have always been held liable to be cancelled, and their occupants dispossessed. Those tenures which were created previous to December 1790, and held in invalid titles, were only liable to assessment, being looked upon as dependant talooks, from which the occupant could not be ejected so long as they continued to pay the rent. Section 30, Regulation II. 1819, prescribes the rules under which claims to assess such lands should be brought, and as no allusion is made in that law to the statute of limitation as barring such claims in any way, suits for assessment of lands held rent-free from a period antecedent to 1790, were admitted and tried, notwithstanding the lapse of twelve or more years from the date of the decennial settlement. Zemindars also found it more convenient to proceed under these rules than to take advantage of the power with which they were invested by the provisions of section 10, of XIX. 1793, so that at the present time almost all suits for land held as lakhiraj, whether before or after 1790, are, properly speaking, for assessment; and not for resumption. Suits then for the assessment of lands held under invalid titles previous to 1790, were, as above observed, admitted and tried under the provisions of section 30, Regulation II. 1819, without reference to the point of limitation, till the decision of the Privy Council, in the case of the Raja of Burdwan against government again raised the

question of limitation, which a long course of precedents of this Court had decided as not barring such claims, and it was brought to issue and determined in the cases of Gungadhur Banerjee, page 501, and Mudhoo Shoodhun Lushkur, page 499, both decided on 10th September 1855. By the former decision it was ruled, that the law of limitation did apply when a Zemindar, not being an auction purchaser, had failed to bring his suit within 12 years from the date of the permanent settlement, and by the latter it was held, that the law of limitation did not bar a suit for assessment preferred by an auction purchaser, if brought within twelve years of his purchase.

In the case of Kinaram Roy of 22nd May 1856, page 439, when the plea of limitation was set up against the right of the Zemindar, to assess on the ground, that the land had been held rent-free for more than twelve years, the Court rejected the plea, though the case of Gungadhur Banerjee was quoted in support of it, holding that "lakhiraj" and "unassessed land" were not convertible terms, and that where the lands were not covered by any lakhiraj grant at all the Zemindar's right to assess was not barred by limitation. As the ruling laid down in Gungadhur Banerjee's case appeared to extend beyond what was intended, and to comprise all cases prior or subsequent to 1790, and the decision come to in Kinaram Roy's case appeared to militate against it, the Court, when next the question came before it, in Degumber Mitter's case, decided on 24th July 1856, page 617, pointed out how limitation was to be applied. It was then laid down, that the Court trying the case should be careful to ascertain whether the tenure pleaded was one referred to in the first three sections of Regulation XIX. 1793, that is to say, whether it was really in existence as a rent-free tenure previous to 1790, otherwise the mere circumstance of the defendant's pleading that it is lakhiraj land, and that he has so held it for more than twelve years, cannot bar the operation of the *nullum tempuss* provision distinctly laid down in section 10 of that law. This is now the ruling case. An attempt to set it aside was made subsequently in the case of Joykishen Mookerjee *versus* Ornopoorna Dossee, on 31st July 1857, when it was held by the majority of the Court, that the ruling in Degumber's case was a mere *obiter dictum*, and that under the ruling of Gangadhur Banerjee's case, the plea of limitation would hold good against a Zemindar, even if he sought to resume lands held rent-free subsequent to the 1st December 1790. This decision was, however, reversed on review, and on 10th January 1859, page 8, the rule laid down in Degumber Mitter's case was finally adopted as being the correct principle.

I have for convenience sake collected together the decision passed on this subject since that on Degumber Mitter's case was passed. But before proceeding to them I may mention the case of Ablak

Roy, decided on 22nd May 1856, page 436. In this case plaintiff sought to assess lands admittedly held as lakhiraj, previous to 1790, but of which no sunnud was forthcoming. He brought his action in the double capacity of an auction purchaser of an 8 anna share of the estate at a sale for arrears of government revenue, and of 3 annas at a sale in execution of a decree, and it was held, that as the action had been brought within twelve years of his auction purchase for arrears of government revenue, plaintiff was in time as regards the 8 annas of the land, but out of time as regards the 3 annas covered by his purchase in execution of a decree of court, as under this latter purchase he had only succeeded to the rights and interests of the former proprietor, who had allowed his right to assess lapse by neglect.

Subsequent to the ruling laid down in the case of Degumber Mitter, is the case of Gunaish Dutt *versus* Dabakur Jha, at page 759, of the reports for 1856, (22nd August.) The suit was disposed of under the precedent of Gungadhur Banerjee's case, and declared to be barred by limitation, the lands having been held under a sunnud from 1763. The case of Radhakanth Bhuttacharjee, decided on 29th November 1856, page 929, followed the ruling in Ablak Roy's case, and it was held that twelve years' quiet possession on inheritance by a lakhirajdar gave him no title as against a Zemindar being an auction purchaser, suing to resume within twelve years from the date of his purchase.

Among the decisions of 1857, the first is an order of the 28th January (page 133) passed in the petition of Ram Ruttun Ghose, and it was held that the Judge was in error in dismissing a suit to assess on the ground of the defendant's possession of the lakhiraj land for twelve years. The first court had found that the tenure dated its existence so far back as 1765, and the Judge was required to determine whether the tenure had been created previous to 1790. A similar order was passed on the petition of Shunker Dutt and others, reported at page 610 of the decisions of 1857, when the judge had likewise held, that possession for twelve years by the lakhirajdar barred the suit. The same order was given in the decision of the 22nd October 1857, Musstt. Asaiah Jahan *versus* Sheo Sohaye Singh (page 1502), also in the petition of Ram Tunnoo Lahoory and others, on 7th May 1857, page 758. In a case decided on 23rd March 1857, page 439, Baryek Anundo Sohaye, plaintiff appellant, it was held, that in conformity with section 10, Regulation XIX. 1793, the suit to oust a lakhirajdar from land granted in 1811 was not barred by the law of limitation.

We find the same principle affirmed in the case of Joy Kishen Mookerjee *versus* Ram Ram Ghose, decided on 10th February 1858, page 194. The case was remanded for the judge to determine

whether the tenure was created previous to 1790. Again in the case of Joy Kishen Mookerjee *versus* Gopal Sein and others, remanded on 11th March 1858, page 403. In the case of Ram Ruttun Ghose, decided on 2nd March 1858, page 340, it was ruled, that before applying the statute of limitations to the Zemindar's claim, the lower courts should ascertain whether the lakhirajdar urging the plea was in a position to do so, that is, whether he was in possession of the lakhiraj tenure at and before 1790, should the lakhirajdar be able to prove that the tenure under which he holds, existed at or before 1790, the lower courts were then to proceed to make any application of the ordinary statute of limitation which the circumstances of the case required. In the case of Dhunram Doss, an auction purchaser, *versus* Poran Coomaree Burmonee, decided on 16th March 1858, it was held by the majority of the Court, that possession of lakhiraj burmuttur for upwards of sixty years was no bar to a suit for the resumption thereof by an auction purchaser. In this case the Court laid down the following rule. "If the "limitation principle which has invariably guided the Court "hitherto when deciding on claims preferred by auction pur- "chasers, be sound and conformable with law of allowing purchasers "to maintain their suits within 12 years of their purchase, not- "withstanding that possession has been held by the defendant "above that period, the same principle must be applicable and "must govern cases which, like the present one, have been brought "within twelve years of the purchase, although the holding may have "existed at the permanent settlement and have continued uninterrupt- "ed for sixty years." In the case of Judoonath Hazra *versus* Ra- sagur Ghose, decided on 25th March 1858, page 507, when the judge held the plea of lakhiraj to be invalid, as the defendant was unable to prove possession of his tenure before the acquisition of the dewanny, it was held, that he should have considered whether the evidence adduced was sufficient to prove the existence of the tenure previous to 1790, thereby entitling the holder thereof to plead limitation against the present action. On 10th November 1858, page 1614, it was held, on the petition of Ram Chand Bose, that the question is not whether the tenure set up before December 1790, was valid or invalid, but whether the lakhiraj tenure now asserted had been enjoyed as such before that date.

Among the decisions of 1859, are the cases of Woomesh Chunder Roy *versus* Gour Chand Gossain and others, decided on 2nd June, page 717, and of Hureemohun Mookerjee, of 21st February, reported at page 169. In both these cases the law of limitation was held to apply, as the judge had found the land to have been held as lakhiraj previous to 1st December 1790.

I have now collected together so as to bring into one view almost all the decisions and orders passed since Degumber Mitter's case was disposed of, on the question of limitation as applicable to suits for the assessment of lands held rent-free, and the course of deci-

sions supports the view advocated by the counsel for the petitioner, that in cases where the land has been held as lakhiraj previous to December 1790, the ordinary rule of limitation will apply except as against an auction purchaser at a sale for arrears of revenue, and against him also if his suit be not brought within 12 years from the date of his purchase, and that auction purchaser whose right of action has expired through neglect cannot revive it, and give his putneedar a right which he himself did not possess.

I find that in the present case, the principal sudder ameen considered that the land had been held as lakhiraj from before the 1st December 1790. The judge in appeal does not displace this finding, but states that under the decisions of this Court of 8th January 1851, page 7, of 14th December 1856, page 995, and 6th April 1857, page 549, such grounds are insufficient for establishing a rent-free tenure. The first decision quoted by the judge was passed before Degumber Mitter's case was tried, and in the other two, the plea of limitation does not appear to have been taken. The existence of the tenure previous to December 1790, would of itself be no ground for holding that the title was valid, but it would enable the holder to plead the statute of limitation even against an auction purchaser should he have failed to bring his action within twelve years from the date of his purchase.

I admit the review to try whether under the finding come to by the principal sudder ameen that the tenure was held as lakhiraj before December 1790, a fact not denied by the judge, as may be inferred from the reasons assigned for holding the title invalid, the present suit is or is not barred by the general law of limitation, the Zemindar, auction purchaser, from whom the plaintiff, putneedar, derives his title, having failed to bring any action for assessment within twelve years from the date of his purchase.

JUDGMENT.

This case was admitted to review on 6th August 1860. The points to be tried as set forth in the proceeding of this Court, admitting the review, are whether the lower courts have found that the tenure was in existence as lakhiraj previous to December 1790, and if so, whether the Zemindar's claim to resume is not barred by the general law of limitation as ruled in several decisions of this Court, quoted in the above proceeding of the 6th August.

Looking at the decision of the judge from which this appeal is preferred, we find that the first court distinctly finds that the tenure was in existence as lakhiraj previous to 1790. The judge, however, looking at certain decisions of the Court held, that this fact, was insufficient to establish the validity of the rent-free tenure, and therefore, gave a decree for the plaintiff seeking to resume. It is urged for the plaintiff, respondent, before us, that the judge does not find that the tenure was in existenee as lakhiraj before December 1790, admitting hereby that if the judge had so found the statute of limitations as ruled by this Court in other case,

would apply. The judge, after stating what the principal sudder ameen found in regard to this tenure, says—"In my opinion, the "defendants have, with reference to the undermentioned decisions "of the Sudder Court in cases of a similar nature, failed to prove "that the land in question have been held under a valid lakhiraj "grant obtained before the 10th December 1790."

Now the validity of the grant was not open to the Judge's consideration. He had merely to determine whether the tenure were in existence before December 1790, and if it were to apply the law of limitation. He has mistaken the purport for which the suit was remanded, while at the same time, we think, he has found that the tenure was in existence before December 1790, but not being on a valid grant, he thought it was resumable, with reference to certain decisions of this Court. It has been observed, however, in the proceeding of the 6th August, admitting the review that of the decisions quoted by the judge, the first was passed before Degumber Mitter's case was tried, and in the other two the question of limitation was not raised. Considering, therefore, that the Judge concurs with the principal sudder ameen in the opinion that the tenure was in existence previous to December 1790, the Court held this suit to be barred by the law of limitation, and reversing the decision of the judge, dismiss the plaintiff's suit, with all costs.

THE 15TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Regular appeals from the decision of Mr. J. S. Bell, Additional Principal Sudder Ameen of 24-Pergunnahs, dated 16th June 1858.

Case No. 484 of 1858.

Collector of the 24-Pergunnahs, (Defendant,) *Appellant,*

versus

Rajkishen Mitter and others, (Plaintiffs,) *Respondents.*

Baboo Ramapersaud Roy, for appellant.

Baboos Sumbhoonath Pundit, Chundernath Chatterjee, and *Obhoy Churn Bose*, for respondents.

as. g. c.

Suit laid at Co.'s Rs. 7,862-15-1-2.

Case No. 512 of 1858.

Nemyechurn Puteetund, (one of the Defendants,) *Appellant,*

versus

Rajkishen Mitter and others, (Plaintiffs,) and others, (Defendants,) *Respondents.*

Baboo Kishenkishore Ghose and *Moulvy Murhumat Hossein*, for appellant.

Baboos Sumbhoonath Pundit, Chundernath Chatterjee, Ramapersaud Roy, and *Obhoychurn Bose*, for respondents.

Suit laid at Co.'s Rs. 4,995-4as., 10g.

Held, that where a deputy collector's proceeding is not an award under Act XIII. of 1848, limitation under that Act cannot apply.

Held also, that plaintiff had not been in possession of the lands in suit for 12 years from the cause of action, but that as Government had received revenue from plaintiff as in possession, Government could not plead limitation against plaintiff

Held on the evidence,—especially with reference to the chittas of 1190 B. S., that the lands in suit were not, as pleaded by plaintiff, in his estate of Madubpore, but were in the Government estate of Ramchunderpore, held by Government under rights acquired by a sale for arrears of revenue, and leased under those rights to defendants.

Held lastly, that where the resumption officers have in the absence of the owner of

THIS was a suit for possession of a certain lands as belonging to plaintiff's talook of Madhubpore or Madunpore, No. 413, with wassilat for the period of dispossession, and was laid at 12,858-3.

The plaintiff avers that beegahs 1520-14-1 were surveyed as towfeer of the above mehal by the Commissioner of the Soonderbuns, and finally received on the 17th September 1829, by a decree of the Special Commissioner. That on this, Doorga Doss Bhutacharjea, Talookdar of Turruf Ramchunderpore, claimed 759*b*., 10*c*. as belonging to his property of Sooltanpore, that this claim was disallowed by the Commissioner of the Soonderbuns, and a settlement made for 176*b*., 12*c*., 6*c*. with Ramrutton Mitter, as talookdar of Madubpore. Plaintiff proceeds to state, that in 1836, Ramchunderpore was sold for arrears of government revenue, and bought in by government; that in 1837 and 1838, talook Madubpore was sold and purchased by Ramdhun Dutt and Hurry Bungh Bose, who sold the talook to the plaintiff. The plaintiff, after this purchase, again endeavoured to obtain possession of the lands from Sultanpore by the aid of the civil court, but the principal sudder ameen, by his proceeding of the 4th September 1841, refused to interfere summarily. The plaintiff goes on to state, that he leased 100 beeghas of land in mouzah Madubpore to certain tenants; but that these last were dispossessed and the crops plundered on the 15th of Agrahun 1248 by the defendant, Kaleedoss Puteedundo; who claimed them as a jote of one Kaleecoomar Mundle, his ryot in Sooltanpore of Ramchunderpore. A suit was brought for the wrongful seizure of the crops, but was dismissed by the sudder ameen in Assar 1249, and in execution of the sudder ameen's order, plaintiff alleges, he lost all possession of about 333*b*., 6*c*. of land viz., the 100 beeghas above referred to, and also 233*b*., 6*c*. more. The plaintiff adds, that although the ameen of deputy collector, Ramchunder Mitter, measured these lands in 1844, as belonging to Sooltanpore, and Mr. Campbell so made the jummabundee in 1845, still the settlement was made with the defendant, but that after various references to the Commissioner of Revenue, the Commissioner of the Soonderbuns, a permanent settlement of 1027*b*., 1*c*. of the 1520*b*., as resumed towfeer of Madubpore was made on the 31st December 1851, with plaintiff, at an annual jumma of Rs. 394-3-6. Plaintiff finally alleging that he still remains dispossessed of the 333*b*., 6*c*. above alluded to, sues for possession and mesne profits of the same.

The answers of the various defendants bring forward the following pleas. I. Limitation under Act XIII. of 1848, as the suit was brought more than 3 years after the 30th March 1847, the date of the first award of the deputy collector on the claim of the plaintiff to a portion of the lands in suit. II. That 221*b*., 4*c*. of the lands in suit were determined on the 5th of February 1834, by the magistrate acting under Regulation XV. of 1824, to belong to Sooltanpore of Ramchunderpore. III. That the sudder ameen's decision of the 26th June 1842, shews that the plaintiff had not any possession of the lands as is alleged by him on the 15th of Augrun 1248. IV. That the measurement of 1244, and the jummabundee of 1245 were both formed on the basis of the measurement papers of 1190*fs*., which recorded the lands to be in Ramchunderpore, and lastly, that as plaintiff has not been shewn ever to have had possession for 12 years, he was barred by the general law of limitation in section 14, Regulation III. of 1793.

Ramchunderpore encroached upon land belonging to that estate, this last person is not prejudiced by the acts of the special resumption courts, but is entitled, notwithstanding the proceedings taken on them in his absence, to retain the lands clearly appertaining to his decennially settled estate. Had government, as owner of Ramchunderpore, appeared before the resumption officers, and had its plea then been rejected, it would doubtless by electing to appear before those special courts have been estopped from urging in the ordinary courts, ought in opposition to the judgment then given against it.

The government distinctly pleaded that the lands in suit were a portion of Sooltanpore in Ramchunderpore; that that was a mehal, the purchased property of government, bought at a sale for arrears, on the 3rd December 1835; that it was at one time under khas collections, i. e., up to 1250 B. S.; and then held on a temporary settlement by defendant, Kaleedoss, from 1251 to 1270. The government admit that the disputed land was at one time wrongly included in Madubpore by mistake in 1851, in a settlement made by the Commissioner of the Soonderbuns, and that government tendered a remission of revenue for the land so included by mistake in the settlement of Madubpore.

On these pleadings the principal sudder ameen remarked, that the plaintiffs' main allegations were that the government in its settlement of Ramchunderpore, only obtained, and therefore, only gave the rights and interests of a farmer, that part of the land now claimed as Ramchunderpore by defendant, was decided by the sudder ameen's order of the 26th December 1851, to be salt lands of Madubpore, and that after various enquiry, a settlement of the lands was made by the Commissioner of the Soonderbuns on the 31st December 1851, with plaintiffs, on the basis of their belonging to Madubpore; and that on proof of these, plaintiff rested his case.

On the plea of limitation raised by the defendant, the principal sudder ameen held, that Act XIII. of 1848 did not bar the suit, inasmuch as defendant based this plea on the decision of the deputy collector, ruling on the 30th of March 1847, that 65 beegahs of the lands in suit belonged to Madubpore and the rest to Sooltanpore. While a decision of that kind in mere demarcation of land for the purpose of government survey, was in no respect a final adjudication of the present claim.

On the plea of the general law of limitation, the principal sudder ameen ruled, that as regarded the point taken by defendant, that this

suit was barred, because it was not brought within 12 years from the decision of the magistrate of the 5th of February 1834, dismissing the claim of Ramrutton Mitter, as talookdar of Madubpore, under Regulation XV. of 1824, the plea was untenable, because plaintiffs were not bound by decisions which affected Ramrutton Mitter not being his representatives. The principal sudder ameen held further, that no limitation barred this suit on the ground of the decision of the sudder ameen of the 16th June 1842, refusing to interfere summarily in a case, where plaintiff sought the aid of the civil court in an alleged case of plunder of crops, because this suit was brought within 12 years of that date, viz., on the 17th of April 1854.

In regard to the defendant's plea that limitation applied, because the lands were entered in the chittas of 1190 as belonging to Ramchunderpore, the principal sudder ameen stated, that this must be determined on a consideration of the merits of the case. On those merits, the principal sudder ameen held, that the entry in the chittas of 1190 was of no avail, as those papers were superseded by the chittas of 1228, on which the decree of the collector, dated 29th April 1824, recovering the lands, and that of the special Commissioner of the 17th September 1829, affirming that resumption were based. The principal sudder ameen held, that as the talookdar of Ramchunderpore had not taken any steps to assert his claim before the Special Commissioner, and as the Soonderbun Commissioner had disallowed his claim on the 16th December 1834, the talookdar was barred by the law of limitation in Clause 12, Section 13, Regulation III. of 1828. The principal sudder ameen further held, that the measurement papers of 1244, and the jummabundee of 1245, by which the lands in suit were regarded as those of Ramchunderpore, did not injuriously affect plaintiff's claim, as government only *leased* to defendants their rights and interests as purchasers of Ramchunderpore; that no settlement was made with the defendant, but was so with the plaintiff, recognizing the lands to belong to Madubpore as evidenced by the 6th para. of the report of the Commissioner of the Soonderbuns, dated 30th July 1852. The principal sudder ameen held this to shew, that neither government nor its lessee had any possession of the lands before defendant evicted plaintiff on the 11th Assar 1249 B. S., and that therefore by the Soonderbun Commissioner having finally settled the land after resumption as those of Madubpore, it was longer open to either defendant to deny plaintiff's claim. The principal sudder ameen accordingly decreed the suit for the land as 344*b*., 13*c*., 3*c*. as found to be the area by the measurement of an ameen on the 15th April 1858. Referring, however to the fact, that plaintiff had not sued for 11 years, 9 months and 24 days from the date of alleged dispossession, the principal sudder ameen did not award the mesne profits sued for, but decreed refund of rent from the date of ejectment, 11th Assar 1924

to the 16th of April 1854, and full wasilat from that date to such date as possession might be given in execution of the decree. These wasilats were declared chargeable on government.

There are two appeals from this decision, government appeals against it on the whole case, urging that there is no proof of plaintiff's possession on the date alleged by him as that of his dispossession; that he had not been in possession within 12 years prior to the institution of the present suit, and consequently is out of court under the law of limitation; that the chittas of 1190 B. S. are those of the decennial settlement, and prove the possession of the lands as part of Ramchunderpore by its talookdar; that the settlement in 1851 of the land as part of Madubpore by the Soonderbun Commissioner was a mistake, and that government, as auction purchaser at a sale for arrears of revenue, comes in with all the rights of a decennial settlement proprietor; that thus with this evidence of right, and with no evidence on the part of defendant of possession, the principal sudder ameen's order determining the lands to belong to Madubpore, and decreeing plaintiff's suit, is altogether incorrect.

The representatives of Kabdoss Puteetundo also appeal on nearly the same grounds, but especially urge, that the principal sudder ameen's holding them barred by the law of limitation is erroneous.

JUDGMENT.

The points in contention are whether the suit is barred by the laws of limitation, and if not, whether the lands appertaining to Madubpore or Ramchunderpore. The admitted facts are these, I. That the chittas of 1190 B. S. shew the lands in suit to have been then entered in those papers as belonging to Ramchunderpore. II. That Ramchunderpore was in 1836 bought by government at a sale for arrears of revenue. III. That the lands in dispute were finally resumed by the Special Commissioner in 1829 in the absence of the owner of Ramchunderpore, and (omitting intermediate facts) were settled by mistake in 1851 by the Commissioner of Soonderbuns as belonging to Madubpore. IV. That government admitting this, and stating that it was a mistake, made a tender of the remission of revenue engaged for under that settlement.

We concur with the principal sudder ameen that Act XIII. of 1848 does not not apply at all in the case, as the deputy collector's proceeding was not an award of the survey officer, between these parties on the subject matter of the suit.

On the question, whether the plaintiff is barred by not having sued within 12 years from the decision of the magistrate under Act XV. of 1824, we are clearly of opinion, that the plaintiff have not been actually in possession of the lands in suit within 12 years from the cause of action. As, however, government, the owner of Ramchunderpore, has been receiving revenue from the plaintiff for the lands in suit up to 1851, that is, within 12 years prior to the institution of this suit as a part of Madubpore. We think,

that it is not open to government to plead, as against the plaintiff, the general law of limitation, but that the receipt of revenue from plaintiff by government as owner of Ramchunderpore, raises a constructive possession on plaintiff's part as owner of Madubpore, sufficient as against government (who as owner of Ramchunderpore is the party chiefly urging this plea) to avoid the statutory bar to the hearing of the suit; and consequently that it is sufficient under the circumstances, to avoid the plea as urged by the appellant, the farmer of Ramchunderpore, under government.

On the merits, we would observe, that government, there is no doubt, by its purchase of Ramchunderpore at a sale for arrears of revenue, purchased all the rights and interests of a decennial settlement proprietor. These rights it could transfer out and out only by sale, or by way of lease, as it did to the defendant in the present suit; but whether it did the one or the other, the question as to the extent of the estate of Ramchunderpore, would in either case be the same. The only question, therefore, remaining for our consideration is, whether the lands in dispute were amongst those acquired by government by the purchase of Ramchunderpore, and subsequently transferred by way of lease to the defendant.

There is no doubt that the chittas of 1190 have always been regarded as the basis of the decennial settlement in the 24-pergunnahs, and nothing has been shewn in this case to impeach the genuineness of the papers filed before me, as copies of those chittas. The principal sudder ameen remarks, that the chittas of 1190 B. S. were superseded by those of 1228 B. S., on which the resumption proceedings were based, but this is incorrect. The chittas of 1190 B. S. could not be legally interfered with by the resumption officers, as they were the basis of the decennial settlement proceedings of the 24-pergunnahs. Subsequent proceedings of the resumption officers could only legitimately extend to the lands not covered by that settlement. In the present instance then, in which the resumption decrees have, in the absence of the owner of Ramchunderpore, encroached upon land belonging to that estate, this last person is not prejudiced by the acts of the special resumption courts, but is entitled, notwithstanding the proceedings taken on them in his absence to retain the lands clearly appertaining to his decennially settled estate. Had government as owner of Ramchunderpore, appeared before them, the resumption officers, and had its plea then been rejected, it would doubtless, by electing to appear before those special courts, have been estopped from urging in the ordinary courts ought in opposition to the judgment then given against it.

In these chittas of 1190, the disputed lands are admitted to be entered as those of Ramchunderpore, and we consider, that this is the best proof on the record of whether they were originally component parts of Ramchunderpore or Madubpore, and in short is conclusive on the issue before the court.

There is no doubt as the government admits, that these lands were in 1851 leased in farming settlement by the Commissioner of the Soonderbuns to the plaintiff; but it is equally clear, that under the circumstances above stated, this was done erroneously. The error is explained by the fact, that the charge of the Ramchunderpore estate, as a government Khas Mehal, was under the collector, and the settlement of Madubpore under the Commissioner of the Soonderbuns, and that these two officers did not communicate details of their proceedings to each other; but any mistake made by government, for which government is ready to make the only compensation in its power, cannot affect the right of the owner of Ramchunderpore, be the same government or any other party.

Under all these circumstances, we reverse the decision of the principal sudder ameen, and decree the appeal with costs. The same order will govern No. 512.

THE 16TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 513 of 1858.

Regular appeal from the decision of Baboo Punchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated 7th April 1858.

Rajah Paronoath Roy, (Plaintiff,) *Appellant,*

versus

Fuqueeroodeen Mahomed Ayhsin Chowdhry, (Defendant,) *Respondent.*

Baboo Dwarkanath Mitter, for appellant,
Baboo Kishenkishore Ghose and *Mr. R. T. Allan,* for respondent.

Suit laid at Co.'s Rs. 13,626.

PLAINTIFF in this suit claims 700 beegahs of land as Bheel Buratee, lands in his mouzah of Goureegaon, in pergunnah Bazoo Chuppah, and mesne profits, and the suit is laid at 13,626 Rs. Plaintiff's main allegations in support of his claim are, that although the joint magistrate of Pubna had before him a decision dated 28th January 1831, in a case under Act XV. of 1824, brought for the possession of Pudobeela belonging to Gopeenathpore, as well as a boundary given in a Solehnamah of 1167, filed by proprietors of Gopeenathpore, which documents supported plaintiff's claim, still the joint magistrate on the 3rd February 1832, upheld the claim of the defendants in a case under Act XV. of 1824, between plaintiff's mother on the one part, and defendant's ancestor, Sheerazoonissa on the other, the plaintiff's mother at that time claiming 15 beegahs as of Goureegaon, and defendant 250 beegahs as of Jooguh-

Held on the facts of this case, that oral testimony, unsupported by any trustworthy document or any evidence, cannot avail to set aside the decision of the Foujdaree Court of the 3rd February 1832, nor would the report of an ameen, based upon the testimony of witnesses taken

at this time, prove the fact of whether plaintiff or his father was in possession within 12 years of the date of suit, so as to justify an interference with the conclusion of the principal sudder ameen, that plaintiff's suit is barred by the statute of limitation.

dah; that plaintiffs were then minors, and the present defendant took occasion to oust plaintiff from other lands of Goureegaon under cover of the joint magistrate's decree; that an investigation was held by the Police and the joint magistrate into this matter, but resulted on the 3rd of December 1838, in the joint magistrate's upholding the defendant's claim in execution of the award of 1832 under Regulation XV. of 1824; that the joint magistrate's order was modified, the case remanded for further investigation, but that it was struck off, and possession given to the defendants of all the lands now in suit, belonging, as plaintiff alleges, to mouzah Goureegaon, the plaintiff then states in detail the boundaries given in the solehnamah of 1167, and in the decision of the 28th January 1831 between Pudobeela and Gopeenathpore as clearly shewing the real boundaries of mouzah Goureegaon, and the lands in suit fall within them, and do not in any way come within the village of Goojoodeho, as part of which defendants claim them, the plaintiff specifies the position of the nullah of Rusoolpore and other landmarks, and argues from this, that the various awards adverse to his claim have been erroneous.

This plaint was filed on the 14th of April 1856.

The answer of defendant denies that there are any of the Bheel Buratee lands in dispute, which belong to the plaintiff's village of Goureegaon, and avers that plaintiff never had any possession of the lands in suit. The defendant avers that they lie in defendant's village of Goojoodeho, the defendant then argues, that the boundaries on which plaintiff relies are not such as he states them, and urges that plaintiff's arguments and inferences in reference to them are erroneous.

On these pleadings the principal sudder ameen put in issue.

I. Whether plaintiff had ever been in possession and been dispossessed of the land in suit.

II. Whether the lands in suit belonged to plaintiff's estate of Goureegaon, or to defendant's of Goojoodeho.

III. Whether any and what wasilat would be due to plaintiff, if the suit were decreed.

The principal sudder ameen held, that the plaintiff had totally failed to prove the first two issues.

The principal sudder ameen also held, that the proceeding under Act XV. of 1824 of the 28th January 1831, on which plaintiff relied as shewing the boundaries of his village of Goureegaon by the definition then given of the boundaries of Gopeenathpore, and thus, that the lands in suit were in plaintiff's village, Goureegaon, did not prove that the lands in suit were in plaintiff's village of Goureegaon.

The principal sudder ameen further held, that although the proceeding of the 3rd February 1832, clearly gave defendant

possession under Regulation XV. of 1824, still the plaintiff had not for 12 years after attaining his majority sued, and that the record in that case shewed, that the alleged dispossession from the lands in suit took place in the life-time of plaintiff's father, who died in March 1828; the principal sudder ameen concluded by stating, that as this plaint was only filed on the 14th April 1856, plaintiff was barred by the statute of limitations. On the other hand, looking to the chittas and other deeds filed by defendant, the principal sudder ameen is of opinion, that the lands in suit belong to defendant's village of Goojoodeho, the principal sudder ameen accordingly dismisses plaintiff's claim.

The plaintiff appeals generally on the point of limitation, and on the whole merits of the case; but the only evidence which the appellant's pleader adduces in appeal is that of 6 witnesses, and the report of an ameen sent out at the time of the present litigation.

This oral testimony, unsupported by any trustworthy document or any evidence, cannot avail to set aside the decision of *the* Foujdaree court of the 3rd of February 1832, nor would the report of an ameen, based upon the testimony of witnesses taken at this time, prove the fact of whether plaintiff or his father was in possession within 12 years of the date of suit, so as to justify an interference with the conclusion of the principal sudder ameen, that plaintiff's suit is barred by the statute of limitation. Under these circumstances, we reject the appeal, with costs.

THE 20TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 320 of 1860.

Regular appeal from the decision of Mr. A. Abercrombie, Collector of Mymensingh, dated the 18th July 1860.

Gobind Chunder Surma Roy and others, (Defendants,) *Appellants,*

versus

Kally Chunder Surma Chowdhree, (Plaintiff,) *Respondent.*

Baboo Ramapersaud Roy, for appellant.

Baboo Sumbhoonauth Pundit, for respondent.

Suit laid at Co.'s Rs. 8,367-14-8-12.

PLAINTIFF, Kally Chunder Surma Chowdhree, zemindar of Kismut Pergunna Pookerah, sues Gobind Chunder Surma and others, for arrears of rent due on a talook held by them, amounting to 8,367-14-8.

Held, that the notice served upon the defendant by Government was no legal notice under Regn. V. of 1812. That

Plaintiff alleges that a 4-anna share of pergunnah Pookerah was, in 1837, sold at a sale for arrears of government revenue, and

moreover, plaintiff was only entitled to the enhanced rent from the commencement of the year following that in which the courts declined his right to enhance rents upon a particular sum, and to interest from the date of the institution of the present suit. Decreed accordingly.

was purchased by government itself; that on the 30th September 1842, corresponding with 15th Assar 1248, a notice of enhancement of rent was served on defendant, on account of a talook held by them. That on the 26th April 184[illegible] a suit was instituted in the civil court against defendant, that subsequently, government assigned its right in the property which it had purchased, to Bhyrub Indernarain Roy, who on the 11th Maugh 1258, sold to plaintiff's deceased father a 2-anna share of the aforesaid zemindary, and subsequently on the 20th Cheit 1257, leased the remaining 2-anna to plaintiff; that by a final decision of the civil court, dated 18th April 1859, the rent of defendant's talook, Megha Mohunpore, was raised from 545, the jumma asserted by the defendant, to 911-8, being an increase of 366-0-1 annually, plaintiff now sues for recovery of rent at the above rate from the date of the notice issued by government to the 30th Cheit 1266, being a period of 17 years, 6 months and 16 days, *minus* payment amounting to 6,543-12-4 with interest, altogther he sued for 8,367 Rs., 14 as. 8 pie.

The defendant pleads 1st, that a portion of the plaintiff's present claim is barred by the statute of limitations, 2nd, That the notice issued by government was no legal notice, as it was not issued in the month of Bysack and Jeit, but in Assar, and as it did not specify the certain rent to be paid either in exact terms or in such a mode as to enable a party to calculate it accurately. 3rd, That the plaintiff is not entitled to the enhanced rent for any period antecedent to the decree declaratory of his right to enhance at a particular rate, and 4th, that he is not entitled to interest for a period antecedent to the institution of the present suit, no demand for the rent having ever been made by him.

The collector of Mymensingh overruled all the pleas of the defendant, and gave plaintiff a decree in full, according to his claim.

From the decree of the collector an appeal has now, under section 160, of Act X. of 1859, been preferred to this Court by the defendants below, and they urged exactly the same objection to the plaintiff's claim that they urged in the court of first instance.

On his first objection arising out of the statute of limitation, we are clearly of opinion, that even if morally entitled to it, plaintiff cannot legally obtain a decree of court for any sum due from a period more than 12 years from the institution of the present suit. Now the present suit was instituted on the 8th June 1860, or the 27th Jeit 1267, it follows, that plaintiff would be entitled, were there no other objections to his claim to any rent which had fallen due, and remained unpaid in or subsequently to Jeit 1255 or June 1848, but his claim to any rent due previous to that time would have lapsed by efflux of time. It is, moreover, unnecessary to pursue this point

further, for we are of opinion, for reasons which will be stated below, that plaintiff is not entitled to rent even for twelve years before the institution of the suit.

On referring to the notice issued by government, when in possession of the estate of Pookerah, which is the basis of the present claim, and to which defendant's second objection looks, we find, that it is in no way a legal notice under Regulation V. of 1812; it was issued in Assar 1249 or September 1842, it is a general notification to the possessor of the shares in land, and is not specific as to the amount of rent to which the parties will be liable, but it merely states, that deductions of 30 per cent will be made from the actual rent of the ryots, and a demand made accordingly. Now sections 9 and 10, of Regulation V. of 1812 prescribe, that the notice shall be served on or before the month of Jeit in the year for which the enhancement is claimed; that the notice shall mention the specific rent, that is, on a liberal interpretation, it shall state, if not the exact year, at least some figures, which, by an easy calculation, will show to the tenant what rent he is required to pay, and also that the notice shall be served, if practicable, personally on the tenant, and if that be not practicable, be affixed to his residence: a notice of the nature of that issued by government, is clearly, therefore, no legal notice at all, and plaintiff's claim as founded on it necessarily falls.

But the question remains to what is plaintiff entitled, and in considering this point, the court takes up the 3rd objection of the defendant, appellant, which is, that plaintiff is only entitled to the enhanced rent for a period subsequent to the decree declaratory of his right to enhance.

We gather from the pleader for the plaintiff, respondent, Shumbhoonauth Pundit, that two suits for a declaration of a right to enhance were instituted, one by government in 1844 decided in 1852, and second by the present plaintiff, which was decided on the 8th December 1857 or Augran 1264, the first decree is not filed in the record, but the second clearly and distinctly declares plaintiff's right to assess the defendant's tenure at 911-8-10, no claim for rents at that rate were made in that suit, it was simply for a declaration of a right to assess; it follows that plaintiff is entitled to claim the enhanced rent from the commencement of the year following that decree, viz., from the commencement of 1265 B. Œ.

It is clear from the plaintiff's claim as admitted by his pleader, that he has collected all the rent at the old rate, amounting to 8,900, his present claim is merely for the difference between the two rates amounting yearly to the sum of 366-0-1; to this difference for reasons given above, we consider plaintiff entitled to for the years 1265 and 1266 altogther for 732-0-2, and we, therefore, give him a decree for the same; it is admitted that no demand

was made for rents at the enhanced rate from the defendant, we, therefore, under the precedents of this court, consider the plaintiff entitled to interest only from the date of the institution of the present suit to the date of realization. The costs of this suit will be borne by the parties in the proportion of the amount of the claim decreed and dismissed.

THE 22ND APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 523 of 1858.

Regular appeal from the decision of Baboo Doorgapersaud Ghose, Additional Principal Sudder Ameen of East Burdwan, dated 22nd June 1858.

Surujnarain Gosain, (one of the Defendants,) *Appellant,*

versus

Musst. Murhum Sukhee Gossain, (Plaintiff,) *Respondent.*

Moulvee Syud Murhumut Hossein, for appellant.

Baboos Kissenkishore Ghose and *Onoocoolchunder Mookerjee,* for respondent.

rs. a. g. c. k.

Suit laid at Company's Rupees 9,522-10-2-2-2.

In the absence of consideration and of any trustworthy evidence to the execution of a deed of gift, the Court passed a decree to cancel the deed as not genuine.

THE object of this suit was to set aside a deed of gift, alleged by the defendant Surujnarain to have been executed by the plaintiff in his favour, bestowing upon him, as her reversionary heir, the entire share of her husband, deceased, in the family property.

The plaintiff states, that on the death of her husband, she became entitled to enjoy during her life-time, the property of her deceased husband, and had entrusted her seal and accounts to the custody of Indurnarain, who married the daughter of her husband by another wife, and acted as her agent in the management of her affairs; that the defendant, Surujnarain, is the son of these persons, and grandson of her husband, and advantage having been taken of her absence from the family residence at a bathing ceremony, to secure her seal, which had been left in charge of Pudonmonee, the wife of defendant; the deed in question was fabricated, by which all her husband's property was bestowed upon Surujnarain and immediate effect given to the same by Surujnarain's applying to the moonsiff of Bamunnarah to substitute his name for the plaintiff's in a suit then pending in his court for arrears of rent; that plaintiff having become almost immediately aware of the fraud practised against her, petitioned the moonsiff to reject the deed of gift and to refuse compliance with Surujnarain's request, but the moonsiff would not accept her repudiation of a deed admittedly bearing her seal, and

failng to alter this decision on appeal to the judge, she brought this action to cancel the deed in question.

The defence set up denies any fraudulent use of the plaintiff's seal, and alleges that the deed of gift was voluntarily executed in Surujnarain's favour out of love and affection, and her near relationship to the plaintiff's husband.

The additional principal sudder ameen, on the evidence adduced before him, and the probabilities of the case, held the deed to have been fraudulently executed without the knowledge of the plaintiff, and to be of no effect, and decreed in favour of plaintiff, with costs against all the defendants.

Surujnarain has appealed on the merits, and his pleader argues, that as plaintiff admits the genuineness of the seal attached to the deed, but impugns it upon the ground of fraud and absence of consent upon her part, the principal sudder ameen was bound to accept the deed until the plaintiff could prove that her seal had been surreptitiously used; and that the discrepancies adverted to by the principal sudder ameen in the evidence of the witnesses, afford no relevant grounds for doubting the deed. The pleader states, that appellant is the heir of plaintiff's deceased husband, by whom he was brought up; that the plaintiff in consideration of this, had executed the deed in his favour to place him at once in possession of his maternal grandfather's property. He denies that the seal was ever left with his mother, or that his father was agent for the plaintiff.

JUDGMENT.

We find that the deed purports to have been executed on the 11th of Chyt 1260; that no consideration passed, and that the plaintiff on the 18th of the same month, when the deed was made, the ground of an application for Surujnarain's name to be substituted for plaintiffs in the court of the moonsiff, in a case then pending, publicly repudiated the deed and declared it to be spurious. No reason is assigned for the gift, and in the face of a denial so prompt and public, we require strong grounds of probability and direct proof before we can confirm such a document. Nothing really trustworthy is, however, forthcoming to bring conviction to our minds; that the deed of gift was executed by the plaintff, and we, therefore, confirm the judgment of the lower court, with costs of this appeal upon the appellant.

THE 22ND APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 522 of 1858.

Regular appeal from the decision of Baboo Doorgapersaud Ghose, Additional Principal Sudder Ameen of East Burdwan, dated the 22nd June 1858.

Jugdanund Gossain, (Defendant,) *Appellant,*

versus

Musst. Murhum Sukhee Gossain, (Plaintiff,) *Respondent.*

Moulvee Syud Muzhumut Hossein, for appellant.

Baboos Kishenkishore Ghose and *Onookoolchunder Mookerjee,* for respondent.

A defendant, who neither supposed the defence set up by the substantial defendant in the case, nor was shown to be connected with the cause of action, allowed his costs.

THIS appeal is on the part of one who was made a defendant in the case brought by plaintiff against Surujnarain Gossain, whose appeal No. 523 on the merits, has been this day decided.

The appellant before us is a member of the family, and was accused by the plaintiff of being the person for whose benefit the deed propounded by his co-defendant, Surujnarain, was created, and on the finding of the lower court, the appellant has been made jointly liable for the plaintiff's costs. It is on the point of costs only, that appellant prefers his objections to the judgment passed. After perusing the answer to the plaint filed by the appellant, and the grounds of the judgment passed by the court below, we see no valid reason to charge costs upon this appellant. He neither supports the defence set up by the defendant Surujnarain, nor does the plaintiff's case show any evidence to connect him directly with the fraud practised upon her.

Under these circumstances, we reverse the order of the additional principal sudder ameen, awarding costs against this appellant, and decree him entitled to receive his own costs from the plaintiff, both in this and in the court below.

THE 24TH APRIL 1861.

H. T. RAIKES, G. LOCH, and H. V. BAYLEY, Esqs., Judges.

Regular appeals from the decision of Baboo Wopendur Chunder Nyaruttun, P. S. Ameen of Jessore, dated 30th April 1858.

Case No. 379 of 1858.

Mr. T. J. Kenny, (Defendant,) *Appellant,*

versus

Anandbhooshun Deb Roy, (Plaintiff,) *Respondent.*

Mr. R. T. Allan and *Baboo Hurrokally Ghose,* for appellant.

Baboos Sumbhoonath Pundit and *Sreenath Dass,* and *Mr. J. W. B. Money,* for respondent.

Case No. 380 of 1858.

Nobinchunder Muzoomdar and others, (Defendants,) *Appellants,*

versus

Anandbhooshun Deb Roy, (Plaintiff,) *Respondent.*

Baboos Ramapersaud Roy and *Hurrokally Ghose,* and *Mr. R. V. Doyne,* for appellants.

Baboos Sumbhoonath Pundit and *Sreenath Dass,* for respondent.

Suit laid at Company's Rupees 8,509-3-10-10.

THE plaintiff on the 6th of August 1856, sued for declaration of right to, and for possession of 800 beegahs of land in mouzah Peerpore, as appertaining to Turf Jungly, pergunnah Mahomed Shahee, in reversal of the award of the survey. He also sued for mesne profits.

The plaintiff's allegations in his plaint were these, viz., that a portion of the western side of mouzah Peerpore having been washed away by the powerful current of the river Coomar, gradually formed into an accretion in connection with it on the south-east of the village, and on the north-west of the three mouths of the river Coomar Jhurjhuria alias Kallgungee. The plaintiff states, that he always had possession of the land in suit, as such increment to his village of Peerpore; that a resumption suit for it was brought against him as such party in possession, while plaintiff's estate was under a manager appointed by the Court of Wards, and was abandoned, plaintiff remaining in possession as before; that this manager then became the farmer of the land, and on the exipry of his farm, the appellant, Kenny, took a farm of these lands, and on the 14th March 1848, presented a petition to the collector of Jessore setting forth that the Jhurjhuria Coomar on the north-west of Peerpore had washed away much land from the north-west side of that village, which had accreted on the south-west; that some of the land so washed away might probably re-form, but that the proprietors of talook

Held with reference to the facts of this case that as in laying down the present course of rivers and other leading topographical delineations of country, the Revenue Surveyors do so by scale and compass, without reference to disputed claims of any kind, and as the Court see that the position of these and the adjoining lands tally in this case in the maps of the survey with the same in the maps of the ameen and decreenuvees, the Court are inclined to prefer these latter maps as more

reliable documents than the map of the darogah.

Held also, on the evidence afforded by the maps, it is clear, that the old bed of the Coomar having dried up, the disputed lands formed as alluvial on the site and in direct contiguity and connection with the lands of Peerpore, while the lands of Tribeeree were separated from these disputed lands by the khal or smaller stream laid down both in the survey maps and in those of the ameen and decreenuvees as thus defining them. In this view, the disputed lands will under the provision of Regulation XI. of 1825. appertain to the village of Peerpore.

Tribeeree were about unjustly to claim some 50 or 60 beegahs not on their own side of the Coomar river.

The plaintiff then proceeds to state in detail, the various enquiries and reports made on the subject of these lands. It is added, that when the survey took place, defendant Kenny caused the lands in suit to be improperly surveyed as part of Tribeeree, he having intermediately taken a putnee of that talook; that plaintiff took all necessary steps to have this improper survey corrected, but without success, and that as plaintiff was a minor, Kenny was enabled to hold possession, and take the profits during his whole lease, viz., up to 1260 B. S.; that the plaintiff reached majority in 1261: that defendant Kenny then applied for a farm of Peerpore, which was given him by plaintiff on the 27th Assar 1261, the words "except the land of the village of which possession has been lost" being inserted in the kubooleut; that till then plaintiff received the full farming rents of Peerpore; but that since the above date, he has not received the rents of the lands in suit, which are part of Peerpore, and plaintiff thus fixes that date as the one of his dispossession. The plaintiff pleads, that the boundaries of Tribeeree and Peerpore respectively have been always admittedly defined by the Coomar, and that as the lands in suit are on the Peerpore side of that river, they must properly belong to plaintiff. Plaintiff accordingly sues for the above 800 beegahs, with wasilat and interest, laying his claim at rupees 8,509.

Kenny, defendant, answers, urging certain objections in bar, (with which the present appeal is not directly connected, and which need not therefore be noticed); and on the merits he pleads, that the lands do not belong to Peerpore, and were never held by the farmers of Peerpore as part of that village; further, that the 50 or 60 beegahs which are referred to as having been claimed by this defendant as Peerpore, improperly taken by the Tribeeree talookdars as theirs, were lands quite distinct from those claimed in this case; that no date is given in the plaint as that of the alleged diluvion on the west side of Peerpore; that the resumption case could have on reference to the lands 50 or 60 beegahs referred to in defendant's petition, as the resumption case was struck off on the 28th May 1846, and his, defendant's petition on the 18th March 1848.

Kenny admits, that the Coomar divided Tribeeree and Peerpore, Tribeeree being to the south-west of it, and Peerpore to the north-east of it; but alleges that the former bed of the Coomar having filled up, the new river now intersected the land of Tribeeree. It is also pleaded, that the original survey proceedings are correct, and have never been set aside on any of the appeals made by plaintiff. The defendant avers, that the real Coomar river now runs in his putnee talook Ramchunderpore, pergunnah Burfuteegunge; that

on the west of Tribeeree, where the lands in suit have now formed, the Jhurjhuriah channel formerly went issuing from the old Coomar river ; that on the olod river closing its waters, extending over the Jhurjhuria channel, overspread the lands of Tribeeree under the name of the new Coomar ; that the deviations of the river Coomar were, first on the east bank, and then on the west ; but that the Coomar still remains in Tribeeree as before ; and consequently the plaintiff's claim, that the diluviations which have formed the lands in suit are diluviations of Peerpore is quite incorrect.

The zemindars of Burfutteegunge, also defendant, claim the land as part of their zemindary, including Turuff Ramch. nderpore, Tribeeree, &c. They admit Kenny's lease from them, and ny that the land ever belonged to Peerpore, or were diluviated fr it, or were ever held in farm by plaintiff's manager under the Co rt of Wards as farmer, or by Kenny, in the same character subsequently.

Upon these pleadings the principal sudder ameen put in issue, whether the lands in suit belonged to Tribeeree or Peerpore ; if to Peerpore, whether plaintiff was entitled to possession on a reversal of the survey awards, and whether he was entitled to any and what mesne profits.

The principal sudder ameen held, that the lands in suit were an alluvion accretion to plaintiff's village of Peerpore, as shewn by the evidence of witnesses ; that Kenny, when he had no interest in Tribeeree, claimed the lands in suit as part of Peerpore, where he then held a farm ; and that when the lands were resumed as Peerpore, no one as interested in Tribeeree claimed the lands for this last village. The principal sudder ameen adds, that the maps of an ameen and of an amlah of his court, support plaintiff's claim, and the testimony of the witnesses who depose to its correctness. On the above grounds the principal sudder ameen decrees plaintiff's case with mesne profits and interest, the costs of suit with interest being charged against the defendant, Kenny.

There are two appeals to this Court from the above decision.

In the one, Kenny appeals, firstly on the general grounds, that plaintiff's claim has not been duly proved ; next, that the Regulation II. suit was struck off on default, and no proprietary rights were adjudicated thereby ; and lastly, that his (Kenny's) petition relied on by the principal sudder ameen had no reference to the lands now in suit ; and that the ameen's report was collusive ; and that the lands in suit appertain to Mouzah Tribeeree, that they had been formerly held by Nobinchunder Mozoomdar and others, and having been washed away from Tribeeree had re-formed on alluvion, and then under the provisions of Regulation XI. of 1825, the decree in favor of the plaintiff as proprietor of the altogether distinct village of Peerpore was erroneous. The other appeal is by the Zemindars of Tribeeree, and is based very much on the same ground.

JUDGMENT.

In this case it is admitted by both parties, that the river Coomar did divide their respective estates. The question now to be decided is, whether the lands in suit are part of Peerpore being accretions to that village from the old channel of the Coomar having dried up, and the new stream having deviated in a south-westerly direction, has left those lands to the west as alluvion of Peerpore. The appellant relies upon a map prepared by a darogah, who was deputed to make a local investigation after the lands had been resumed under Regulation II. of 1819, the registered maps drawn by an ameen and the decreenuvees of the principal sudder ameen's court.

One of the main differences in these maps, and the one most affecting the decision of this case is, that in the darogah's map the former stream of the Coomar is represented as running nearly east and west, partly dried up and partly with water, and the disputed lands are represented as lying on the south side of that stream with Ramchunderpore and Tribeeree, that is, with appellant's land and Peerpore and Goalpara of plaintiff's estate are shewn by it to be on the north side of the stream.

In the maps of the ameen and decreenuvees relied on by respondent, the old bed of the Coomar is represented as dried up; the present stream is shewn to have taken a south-westerly course, and the lands in dispute to have directly and clearly joined as alluvion lands on to Peerpore. It may be added, that the maps of the ameen shew that the dried up bed of the old Coomar did not run so directly east west as is represented in the map of the darogah, but with a considerable south-easterly start.

Setting aside for the present the oral testimony in the case, we find that the revenue survey map of these villages executed in 1854 and 1855 (this suit being filed on the 6th August 1856) shews the course of the Coomar to be in accordance with the definition of its course laid down in the maps of the ameen and decreenuvees, and the position of the alluvial land in these last maps, viz., as an accretion to Peerpore, also corresponds with the revenue survey map. Now in laying down the present course of rivers and other leading topographical delineations of country, the Revenue Surveyors do so by scale and compass, without reference to disputed claims of any kind, when, therefore, the Court see that the positions of these and the adjoining land tally in this case in the maps of the survey, with the same in the maps of the ameen and decreenuvees, the Court are inclined to prefer these latter maps as more reliable documents than the maps of the Darogah.

Some stress is laid by the principal sudder ameen on the fact, that when Kenny was farmer of Peerpore, he claimed part of the lands now in suit as belonging to Peerpore and not as now to Tribeeree, and the appellant pleads that the principal sudder

ameen has altogether erred in this, as the lands are in no respect identical, and indeed it has been further argued, that as the same interests were not involved when Kenny made this claim, as are now, he is not bound by this petition then. The petition dated 14th March 1848, then claimed some 60 beegahs as belonging to Peerpore, and as having accreted from the diluviations of the Jhurjhurea Coomar river to the north-west, and alluviated to the south west, i. e., to the north of the old bed of the Coomar, taking that bed from the darogah's map relied on by the defendant. In the present case the identity of these lands is not very clearly shewn, but we do not think it necessary to remark further on this point, because on the evidence afforded by the maps, it is clear that the old bed of the Coomar having dried up, the disputed lands formed as alluvial on the site and in direct contiguity and connection with the lands of Peerpore, while the lands of Tribeeree separated from these disputed lands by the khal or smaller stream laid down both in the survey maps and in those of the ameen and decreenuvees as thus defining them. In this view, the disputed lands will, under the provisions of Regulation XI. of 1825, appertain to the village of Peerpore.

It has to be noticed, that the appellant's witnesses depose, that the Coomar made an irruption into the lands of Tribeeree and intersected them, leaving them on both sides of the stream.

But this evidence is contradicted by the more trustworthy definitions laid down in the maps of the survey and the ameen and decreenuvees. On the whole record then, we see no reason to interfere with the decision of the court below, and as both appeals are based on the same grounds, we dismiss both with costs.

THE 25TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQRS., Judges.

Case No. 584 of 1858.

Regular appeal from the decision of Mr. J. Weston, Principal Sudder Ameen of Tirhoot, dated the 11th July 1857.

Anand Gopaul Suhaye, (Defendant,) *Appellant,*

versus

Musst. Dursun Koowur, (Plaintiff,) *Respondent.*

Baboo Sumbhoonath Pundit and *Mr. R. T. Allan*, for appellant.

Baboo Ramapershad Roy and *Moonshee Ameer Ally*, for respondent.

Suit laid at Co.'s Rs. 14,729.

Held, that as between a Hindoo widow su-

THE plaintiff in this case sued on the 28th August 1856, as the widow of her deceased husband, who, it is admitted, died on the 15th

ng for maintenance and the heirs of her husband refusing to pay her the same, a relation of trust existing; the statute of limitation will not apply to bar the suit.

Held that the plaintiff is clearly entitled to the property, for which she stipulated in the ikrar admitted by the defendant; that her possession of the same and her subsequent dispossession in Assin 1252 are sufficiently proved.

Decreed accordingly.

Bysack 1239. Defendant is the brother of the plaintiff's husband. Plaintiff's suit is for possession of an 8-anna share of mehals Madubpore and Munjee, with mesne profits. Plaintiff's allegations are, that her husband and defendant held various properties separately share and share alike, and lived separately till the death of the former, on which plaintiff, as his widow, took possession of her husband's property; but that when she wished to have her name registered in 1254 B. S., she was opposed by defendant, who produced an agreement or ikrar purporting to have been executed by her on the 21st October 1843, by which she agreed to give up all claims to her husband's property, on receiving an eight anna share of mehals Madubpore and Munjee; that this ikrar was not agreed to by her on the date of its alleged execution; that for some time disputes continued, but she (plaintiff) remained in possession of all her deceased husband's property, and was about to sue in the civil court about the year 1845 for registration and declaration of her right, when the defendant and others pursuaded her to accept the 8-anna share of mehals Madubpore and Munjee, mentioned in the alleged ikrar, and she did accept it; that the defendant, however, did not give her the property in question as promised, but demanded a portion of it himself, and did not give over to her the leases belonging to it, and that finally the defendant dispossessed her from the 10th Agran 1252. Plaintiff, therefore, sued under the ikrarnamah for the property to which she was entitled under it.

Defendant pleaded limitation, stating the cause of action to have commenced on the 15th Bysack 1239 or April 1832, but that even taking the cause of action from the date of the ikrar, viz., 21st October 1843, plaintiff was barred by the statute of limitation; defendant also denied that plaintiff was dispossessed on the 1st Agran 1252, arguing that as before that date plaintiff had repudiated the ikrar, she could not say that she was in possession under that deed; the defendant further denied, that plaintiff's husband and himself lived separately.

The principal sudder ameen summoned the defendant as a witness, on his refusing to appear, the case was decided *ex-parte*; but the principal sudder ameen took up the plea of limitation as on the record, he held, that it was clear from a petition of defendant of 16th January 1854, that defendant admitted plaintiffs' possession of the property referred to in the ikrarnamah, and that with reference to this and other documentary proofs, plaintiff's possession, till her alleged dispossession on the 1st Assin 1252, was proved; that from that date to that of suit, 12 years not having elapsed, the law of limitation did not apply, further that 12 years had not elapsed from the date of plaintiff's acceptance of the terms of the ikrar to that of suit. On the merits, the principal sudder ame

has held on the evidence, that plaintiff was entitled to a declaration of her right to, and to be put in possession of the property entered in the ikrar with mesne profits, from date of dispossession (1st Agran 1252) to date of ascertainment in execution and interest on them, from the latter date to that of realization.

Defendant appeals, urging, that limitation bars the suit, plaintiff never having had possession or been dispossessed, on the 1st of Assin 1252, and that the finding of the principal sudder ameen on the evidence adduced by plaintiff is incorrect.

The first point to be noticed in this case is, that the defendant when summoned to appear as a witness under Section 24, Act XIX. of 1853, was recusant, and the case was decided against him *ex-parte*. He now appeals upon the record. The plaintiff, respondent, objects to the hearing of the appeal, firstly, as under Act VIII. of 1859, there is no appeal from such an *ex-parte* decision, and secondly, because, under Act XIX. of 1853, the defendant cannot appeal. We, however, are of opinion, that this being a case decided under the old procedure, there is no occasion to consider the effect of the new code of procedure in respect to it, and that under Act XIX. of 1853 there is nothing to prevent the defendant, whose case has been decided *ex-parte*, appealing on the record as it stands.

It is clear, that in this case, plaintiff sues under the ikrar. The record shews that defendant himself pleaded the execution of that ikrar in the collectorate, on the 16th January 1854; the ikrar must therefore be taken as the deed with reference to which this case has to be considered; the terms of the ikrar clearly shew, that plaintiff accepted an 8-anna share of mehals Madubpore and Mui[illegible]e as maintenance, giving up all claims to the rest of her husband's property. We are of opinion, in accordance with the recent decision of this Court, that where land is sold for in lieu of maintenance, there, as between the relatives of the widow's husband and the widow herself, the relation being one of trust, the suit is not affected by the law of limitation. We further think upon the evidence on the record, that plaintiff's possession of the property entered in the ikrar, and now sued for, and her dispossession from 1st Assin, 1252, are sufficiently proved, and that she is consequently entitled to the decree given in her favor by the principal sudder ameen. We accordingly reject this appeal, with costs.

THE 30TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 506 of 1858.

Regular appeal from the decision of Baboo Punchanund Banerjea, Principal Sudder Ameen of Rajshahye, dated 26th February 1858.

Raibully Dossea and others, (Defendants,) *Appellants,*

versus

Anund Mohun Moitro and others, (Plaintiffs,) *Respondents.*

Baboos Aushootosh Chatterjea, Obhoy Churn Bose, and *Ramapersaud Roy,* for appellants.

Baboos Kishenkishore Ghose and *Sumbhoonath Pundit,* for respondents.

Suit laid at Co.'s Rs. 8,156.

Held, on the facts of this case, that as the suit was brought within 12 years from the date of Rajah Kishennath's attaining majority as to the lands of which dispossession first took place, and as in respect to other lands, the putneedar had proved possession and had sued within 12 years after dispossession, the law of limitation was no bar.

Held also, that the appellant has shewn nothing to refute the principal Sudder ameen's finding on the whole evidence, viz., the proceedings at the time of the resumption suit and the maps and reports then submitted after local enquiry, shewing the plaintiff's lands to which

THE plaintiff in this case sues for possession of 1814 beegahs, 15*c.*, 12*c.* of land in the 14-as. 8g. share of Kismut Bailghatta Rajaroy, and in the 8-as. share of Kismut Kasimpore, belonging to the 13-anas-share of pergunnah Chandye, and for 5½-ans. of the Julkur Muhra Darya with certain Damooses, and to reverse awards made in the survey department and in the criminal courts. The suit is laid at Rs. 8,956.

The lands are stated to have been leased on the 4th of Shrabun 1251 on putnee, by Rajah Kishennath Roy for 8,500 Rs. to Moulvie Mahommed Hossein. This putneedar fell into arrears, and the lot was sold and purchased on the 2nd Jeit 1256 by Lutchmee Khan and others. It was again sold for arrears, and purchased on the 2nd Jeit 1256, by plaintiff from her *streedhun.* Plaintiff proceeds to state, that after she took possession, she learnt that the Mahanuddee river had, since 1203, been washing away, the lands of Bailghatta Rajaroy and Kasimpore, and that 1051*bs.*, 6*c.* of the former, viz., Bailghatta Rajaroy, had been thus washed away and had all re-formed on their original sites, and that 1153*bs.*, 9*c.* of Kasimpore had been washed away there, of which 900*bs.* had re-formed on the original sites, and 253*bs.*, 9*c.* remained as marsh. Plaintiff adds, that these accreted lands in Bailghatta Rajaroy were up to 1227 B. S. held by Hurrynath Roy, father of Kishennath, as part of Bailghatta in his zemindaree of the Chandye, and that 250*bs.* of these lands formed the subject of a resumption suit, which resulted in their being released by the Special Commissioner on the 7th May 1831 or 15th Jeit 1238 as lands of Bailghatta; that between 1238 and 1242 further accretions took place, viz., 313*bs.* to Bailghatta Rajaroy, and 900 to Kasimpore, and that in 1242, Chundeenaram Roy, the neighbouring zemindar of pergunnah Sherishabad dispossessed

Kishennath, the then minor zemindar of pergunnah Chandye, of 268 of the above 313, accreted to Bailghatta Rajaroy, and of 600 of the 900*bs.*, accreted to Kasimpore, and that the magistrate gave to the defendant possession of 586*bs.*, of plaintiff's lands, by an order under Act IV. of 1840, and against the terms of the Special Commissioner's decrees; that the deputy collector in the survey department also mapped the lands in dispute as belonging to pergunnah Sherishabad, rejecting on the 31st October 1848, the putneedar's claim to them, as belonging to Chandye, and referring the putneedars to a civil suit, this order being upheld by the superintendent of survey on the 19th of November 1849. In respect to the Julkur, for which plaintiff sues, he states, that possession of it was awarded to the putneedar on the 26th of January 1846 by the joint magistrate, but that his order was reversed by the session judge on the 26th of March. The plaintiff adds, that he sues in this suit for the lands of which he has been thus dispossessed, and that the basis of his claim is, that the lands in suit have accreted on the original sites of lands of her villages previously washed away, and that their position is in contiguity to those villages he specifies in the zemindaree of pergunnah Chandye of which they form a part.

he alleges the lands in suit to be accretions and the lands in suit to be bounded on the west by the Mahanuddee river, while those villages to which defendant alleges the accretions to appertain are there shewn to be on the north of that river.

Held lastly, that the principal sudder ameen decided rightly, that on the whole, the evidence in favor of plaintiff's case preponderated.

The separate answers of the defendant's co-sharers in the lands of pergunnah Sherishabad, commence with objections as to want of precision in the plaint, viz., as to non-specification of boundaries, and as to defect of parties. The defendant then proceed to deny entirely that the lands in suit belong to Bailghatta Rajapore, or Kasimpore, of pergunnah Chandye, as accretions on original sites of lands diluviated from those villages, stating that the only lands ever washed away were 40 or 50 beegahs in Bailghatta in 1213, which re-formed in 1227, for which Raja Hurnath got 250 beegahs released by the Special Commissioner, and took and kept possession of the same. Defendant denies that any diluvion took place in 1203, or that any other alluvion has ever taken place except that of the 40 or 50*bs.* in 1227. It is also pleaded, that the plaintiff's case is barred by the law of limitation, and that defendant never dispossessed plaintiff of any lands belonging to him; but that the lands in suit belong to the villages of Seebpore, Hureepore and Hatbara, and Doorgapore of Turruf Neemgachea, in the zemindaree of pergunnah Sherishabad. The defendants plead, that the lands were diluviated in 1210, B. S., and re-formed in 1230 B. S., further that they are quite distinct from the lands released to Raja Hurnath Roy by the suit under Regulation II. of 1819, inasmuch as those lands so released were to the east of the *katan ail*, while the lands in suit are to the west, as to the Julkur, defendants plead that it belongs to their property of Bansbareea, and has always been in their possession as such.

Upon these pleadings the principal sudder ameen at first nonsuited the case on the 9th of May 1855, for defect of parties and indistinctness as to the cause of action, but on appeal to this Court, the case was remanded for trial on the merits under date the 15th December 1856, this court ruling that there was no such defect of parties or indistinctness as to the cause of action that the suits could not duly proceed. Upon this remand, the principal sudder ameen considering that the decision of the Special Commissioner of the 27th May 1831, releasing the lands as accretions formed on the site of the original lands of Bailghatta, and the map prepared in that case after a local enquiry, and the ameen's report of the 8th March 1830, shewed the lands in suit to be bounded on the west by the Mahanuddee river, and that river to be the western boundary of plaintiff's villages of Bailghatta and Kasimpore, decided that the lands in suit were lands accreted on the original sites of diluviated lands of Bailghatta and Kasimpore, and re-formed on the main lands of those villages, the principal sudder ameen remarked, that on the other hand, the defendants had adduced no proof, that the mehals of Hureepore and Neemgachea, to which the defendants alleged that the lands in suit belonged, were situated on the west of Bailghatta and Kasimpore, and the map in the resumption case shewed their lands of Hureepore and Neemgachea were on the north of the Mahanuddee river, and that in such a case, the resumption decreed was good evidence in support of plaintiff's claim, although defendants were not parties to that decree.

The principal sudder ameen also held, that although the area now claimed was longer than that in the resumption suit. Still plaintiff was entitled to a decree of his present claim, inasmuch as the accretions being on the plaintiff's villages, the right to them under Section 4, Regn. XI. of 1825 was with plaintiff. The principal sudder ameen rejected the plea of limitation on the ground, that the suit was brought within 12 years of the minor Raja Kishennath attaining his majority, as to the lands of which dispossession first took place; and on the ground that the putteedars and their representatives had possession, and were dispossessed in the manner and on the dates alleged by them; that is, within 12 years of the suit. The principal sudder ameen accordingly decreed plaintiff's suit with costs.

Defendant appeals and urges, 1*st*. That Raja Kishennath's minority did not affect the cause of action of the plaintiffs, which, as far as the present plaintiffs, the putneedars, were concerned, arose more than 12 years before the suit was brought.

2nd. That the burden of proof was on the plaintiffs, and that they had not proved their case.

3rd. That the proceedings in the suit under Regulation II. of 1819 could not be used against the appellant, as they were not parties to that suit.

4th. That a proceeding of the collector and a report by his nazir, shewing the lands on both sides of the river to belong to defendant, had not been duly considered by the principal sudder ameen.

JUDGMENT.

On the point of limitation we concur with the principal sudder ameen, that as the suit was brought within 12 years from the date of Raja Kishennath attaining majority as to the lands of which dispossession first took place, and as in respect to other lands, the putneedar had proved possession, and had sued within 12 years after dispossession, the law of limitation was no bar.

As to the remaining pleas on the merits, we think, that the appellant has shewn nothing to refute the principal sudder ameen's finding on the whole evidence, viz., the proceedings at the time of the resumption suit, and the maps and reports then submitted after local enquiry shewing the plaintiff's mehals to which he alleges the lands in suit to be accretion, and the lands in suit to be bounded on the west by the Malfanuddee river, while those villages to which defendant alleges the accretions to appertain, are there shewn to be on the north of that river. Defendant's documentary evidence consists of a nazir's report, and of a chitta prepared by his own people. Neither of these papers are shewn ever to have been accepted in any court of justice. We, therefore, consider that the principal sudder ameen decided rightly, that on the whole, the evidence in favor of plaintiff's case preponderated.

We do not think, therefore, that the appellant has shewn us any sufficient ground for our interfering with the decision of the court below, and we accordingly dismiss the appeal, with costs.

THE 30TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, Esqs., Judges.

Regular appeals from the decision of Mr. J. DaCosta, Acting Principal Sudder Ameen of Bhagulpore, dated the 15th July 1858.

Case No. 552 of 1858.

Rajah Mohendernarain Sing, (Defendant,) *Appellant,*

versus

Rajah Neelanund Sing, (Plaintiff,) and Raja Joymungul Sing Bahadoor, (Defendant,) *Respondents.*

Baboos Sumbhoonath Pundit and *Bungsheebuddun Mitter*, for appellant.

Baboos Ramapersaud Roy and *Kishenkishore Ghose*, and *Moonshee Ameer Ally*, for respondents.

Case No. 553 of 1858.

Rajah Joymungul Sing Bahadoor, (Defendant,) *Appellant,*

versus

Raja Neelanund Sing, (Plaintiff,) and Rajah Mohendernarain Sing, (Defendant,) *Respondents.*

Moulvee Syud Murhumut Hossein and *Baboo Jugdanund Mookerjee,* for appellant.

Baboos Ramapersaud Roy and *Kishenkishore Ghose,* and *Moonshee Ameer Ally,* for respondents.

Suit laid at Co.'s Rs. 45,525.

The plaintiff having failed to prove the existence of a certain stream in the position asserted by hm, was held to have failed to establish his boundary line in the position claimed by him. His suit was, therefore, dismissed.

THE plaintiff, Raja Neelanund Sing, sued the two appellants to rectify the survey of their neighbouring estates, by demarcating a new boundary line between them, the boundary recorded by the survey, having, according to plaintiff's averment, deprived him of 5,000 beegahs of land belonging to his estate of Singhole, of which the defendant Mohendernarain had appropriated 2,500, and Joymungul Sing a similar quantity.

The plaintiff in describing the position of the land in dispute by its boundaries, states, that it extends from the north at a place called Ghudar Ghat, running into a range of hills on that side to the Pengarra Khoord river on the south, and that the latter river forms his extreme southern boundary line. The defendant while admitting that plaintiff's possession extends on the south to the stream called the Pengarra Khoord, disputes the locality assumed by the plaintiff for that stream, and places it considerably to the north of the site pointed out by the plaintiff, and alleges that that locality has always been the boundary line between their respective estates, and disputes plaintiff's right to any lands south of this land-mark.

In order to show that he is entitled to the possession of the land he now claims, the plaintiff, Neelanund Sing avers, that on the occasion of some dispute regarding the jungle products of the lands in question, a complaint of disturbed possession was made by his predecessors against the ancestors of one of the defendants, which was heard and determined by the register of Monghyr, on the 4th of November 1816.

By those proceedings the plaintiff asserts, his predecessors were maintained in possession of the lands now in dispute, and on the occurrence of a second contention between the same parties at a later period, the matter was referred to arbitrators, who were directed to ascertain and report upon the exact position of the lands, which had been the subject of the decision in 1816 before the register of Monghyr, with the view of securing the plaintiff's predecessors in possession of the lands originally contended for; and the plaintiff now relies upon a map, drawn up by Howlas Rai, one of the

arbitrators, and upon the deposition of Boodenarain ameen, regarding the localities then demarcated in the map in question, as showing, that the lands now claimed by him are identical with those mapped and reported upon by Howlas Rai as subject of dispute in 1816, and then decreed in his favor, and consequently forms a part of his estate, which have all along been in the possession of his predecessors and himself.

On the other hand, the defence set up by both defendants is, that the decision in 1816, defines no boundaries specifically, and that the report and map of Howlas Rai, one of the arbitrators, was contradicted by the report of Mooter Roy, the other arbitrator, and that in consequence of their difference of opinion, no decision was ever recorded on the matter of the boundaries intended to be followed in 1816, that plaintiff, therefore, can derive no benefit to his interests from the map and report of Howlas Rai or the deposition of Boodenarain, as the accuracy of the map was never tested by any award being given thereon in the plaintiff's favor. That when the Survey Officers compared the map of Howlas Rai, with the localities on the spot, that map was held to be inaccurate and untrustworthy; and plaintiff's possession not in accordance therewith. The defendants, therefore, urged that those proceedings could afford no support to plaintiff's case.

The principal sudder ameen has decreed for plaintiff on the whole claim submitted to him, basing his decision upon the map and report of Howlas Rai and the deposition of Boodenarain, from which he deduces that plaintiff's predecessors were maintained in possession of all the lands extending from Ghudar Ghat on the north, to the Pengarra Khoord on the south, and that both the map of Howlas and the description of the localities noted thereon, as given in the deposition on oath of Boodenarain in 1831, show that the southernmost stream indicated in the map is the Pengarra Khoord as pleaded by the plaintiff, while the more northern stream to which the defendants assign the name of Pengarra Khoord, is not the Pengarra Khoord of the arbitrator's map, and cannot be the recorded boundary between the two estates of the contending parties.

The appeal involves the whole merits of the contention between the parties; but after hearing a number of papers read to us from the record, and after being led away by the pleaders on both sides, with the consideration of a great deal of what proved to be irrelevant matter, we found it was admitted by both sides, that the plaintiff's case really turned upon which of the two streams flowing in nearly parallel lines to each other in the map marked B, by the principal sudder ameen in the Pengarra Khoord, as that is now allowed to be the southern boundary mark of the plaintiff's

possession under the proceedings initiated by his predecessor in 1816. In this contention, it has of course been the object of plaintiff's pleaders to make out, that the most southern stream is the Pengarra Khoord, declared by the defendants to be the Pengarra Kullan, a name which the plaintiff attaches to another or more northern stream. Both these rivulets, stated to be the Pengarra Khoord by the parties respectively, have their source in some hills on the eastern side of the map, which run from east to west, and the streams flow in the same direction, but on the north and south side of this small range of hills. To the north again of the northern stream is the range of hills in which Ghudar Ghat is situate. From that range of hills up to the range whence the two Pengarra streams flow, there is no dispute for lands; for although the defendants assert they might dispute plaintiff's right to cross the most northern of these rivulets (called by them the Pengarra Khoord), they admit he has held possession so far beyond their Pengarra Khoord, as the small line of hills without question, and it is only for the lands claimed by the plaintiff between the small range and the other rivulet that the present contention exists.

The pleaders of the plaintiff point to the map of Howlas Rai, (marked A, by the principal sudder ameen) and state, that the southern rivulet therein described as the Pengarra Khoord, must be identical with the southern rivulet of the map B, and that the stream branching from it in map B, on the north, is the Pengarra Kullan, while the rivulet flowing on the other side of the hills is neither the Pengarra Khoord or Kullan, but bears a different name altogether; on comparing Howlas' map, however, with the map B, we find, that the stream called by Howlas the Pengarra Khoord, takes its rise in some hills further to the east than those from whence the two streams flow in map B, and that no such stream so rising is demarcated at all in the survey proceedings. It is part of plaintiff's case, that the survey proceedings do not recognize the existence of any stream at all in the locality given to the Pengarra Khoord in Howlas' map, and on this ground, he asks, that the survey proceedings may be altered; but we consider that we are bound to treat those proceedings as correct so far as the appearance of the country is recorded therein. Did we at once accept Howlas' map as our guide, we should apparently introduce a streamlet where no stream of water at present exists, and this appears to us to be an insurmountable difficulty against adopting Howlas' map as any sort of evidence on the point in question before us. Had the face of the country shewn the existence of a stream in the locality depicted in Howlas' map, it is easy to understand, how

a contention might arise as to the name of the stream and its position as a boundary mark, but where the face of the country indicates no such feature, it is impossible for the Court to determine that it must exist there, and must form a boundary line to the adjacent estates. Had the plaintiff's pleaders been able to satisfy us that such a rivulet as that marked in Howlas Rai's map really occupied the place Howlas assigns to it, and had also shewn from the evidence on record that plaintiff had held possession of the lands up to its brink until the survey, we should have considered him entitled to a decree for possession and for alteration of the survey demarcation. But as the proof on the record does not support any such case in his favor, and the survey proceedings, while able to trace out the streamlet indicated by the defendant as Pengarra Khoord, have been unable to fix the rivulet of Howlas' map as recorded therein, we do not think the plaintiff has made out any case entitling him to a judgment in his favor.

The plaintiff, moreover, claims as the Pengarra Khoord, a stream issuing from Joor Dhoba hill, but any stream so rising, is utterly irreconcilable with the position of the Pengarra Khoord of Howlas' map, on which plaintiff bases his whole case, and as to the Pengarra Khoord arising elsewhere, as delineated by Howlas, we have the assurance of the survey proceedings, that no such stream is now in existence. The plaintiff has, therefore, failed altogether to prove, that the stream he claims to, is the Pengarra Khoord, and we reverse the decision of the principal sudder ameen, with costs of both courts for the defendants.

THE 30TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, Esq., Judges.

No. 574 of 1858.

Regular appeal from the decision of Mr. E. Jenkins, Additional Judge of Tirhoot, dated the 10th July 1858.

Mirza Abud Hossein, (Defendant,) *Appellant,*

versus

Brijoobeharee Lall and others, (Plaintiffs,) *Respondents.*

Moonshee Ameer Ali, for appellant.

Baboo Kally Prosunno Dutt, for respondents.

Suit laid at Co.'s Rs. 6,531-5-10.

Plaintiff having sued on an ikrarnamah and got a money decree, held that he was not

THE averments of the plaint are, that the plaintiff being about to purchase an estate from one Jypora Koer, and being apprehensive that the property might be held liable for certain judgment claims then due by the lady, refused to make the purchase, unless

entitled to sue again on the same instrument to make specially liable certain property pledged to him in the ikrarnamah as security for its fulfilment.

one Ajeetnarain Sing guaranteed him the amount of the purchase money in the event of the creditors making good their claims against the property. Ajeetnarain accordingly executed an ikrarnamah to the above effect, and also conditioned therein, (if he could not make good the purchase money) to execute a bill of sale of his share in Mouzah Sadoollapore, and to make over the village to the plaintiff. Plaintiff then concluded the purchase of the property from Jypora Koer by bill of sale, dated the 22nd October 1846 for 3,750 Rs., and Ajeetnarain executed the ikrarnamah in plaintiff's favor in the terms agreed upon on the 24th October 1846. The judgment creditors of Jypora Koer subsequently brought an action to set aside this sale of her property, and on the 22nd June 1850, a decree was passed, cancelling the deed of sale held by the plaintiff and permitting execution of the judgment creditors, decrees against the property sold to him.

Plaintiff then brought an action against Ajeetnarain and Mustt. Jypora Koer, for recovery of the purchase money paid by him, and founded the action on the ikrarnamah executed by Ajeetnarain, and in due course procured a decree against the latter for the amount sued for on the 16th June 1855. Plaintiff then attached the village of Sadoollapore as the property of Ajeetnarain, in order to bring it to sale in satisfaction of his decree, but was opposed by the defendant Abud Hossein, who pleaded, that Ajeetnarain had already sold the village in question to him on the 6th May 1850, for a *bona fide* consideration. On this issue being tried in execution of plaintiffs decree, the plea was allowed and execution refused against the village in question. Plaintiff then brought the present suit to set aside the sale of Sadoollapore by Ajeetnarain to Abud Hossein of the 6th of May 1850, and to reverse the proceedings in the execution case staying the sale of the property. In the argument by which plaintiff supports his averments, he urges, that the ikrarnamah executed in his favor by Ajeetnarain guaranteeing him from any loss in respect to the purchase money paid by him, pledges Ajeetnarain to execute a bill of sale for the village of Sadoollapore in the event of his not making good the purchase money; that any subsequent sale of the village must necessarily be invalid, as interfering with the conditions of the instrument, and plaintiff, therefore, argues that the subsequent sale to Abud Hossein can be no bar to his right to realize his decree by sale of the property in question.

The defence of the defendant principally interested, Mirza Abud Hossein, denied the right of the plaintiff to deprive him of the village, asserted the *bona fide* nature of his purchase, and alleged that the sale of Jypora to plaintiff and the ikrarnamah executed by Ajeetnarain, were collusive transactions and in fraud of creditors,

and that upon that ground, the plaintiff's purchase of Jypora Koer's property was set aside, that plaintiff, moreover, acquired no title in Sadoollapore under the ikrarnamah, and has only a money decree against Ajeetnarain, which can be good only against any property still in the possession of his debtor, but can give him no right to touch property which the debtor has already conveyed to another for good consideration and in good faith.

"The additional judge has decreed for the plaintiff. He observes that the main point for consideration in this suit is, whether or not the defendant, Ajeetnarain Sing, previous to the sale to the defendant, Mirza Abud Hossein, of his 4-annas share of the village Sadoollapore, had pledged it to the plaintiff," and then on the ground, that Ajeetnarain Sing, in the case brought by plaintiff on the ikrarnamah, had admitted himself to be bound by his own engagement not to sell, the judge holds that instrument to have been duly executed by Ajeetnarain, and as the terms of that deed provide, that if plaintiff is deprived of the property purchased from Jypora Koer; and Ajeetnarain Sing does not repay the whole amount of the purchase money in cash, he will then deliver over to plaintiff 4-annas of the village of Sadoollapore by deed of sale, and that on failure to do so, the plaintiff is entitled to take possession of the share, "there cannot be a shadow of doubt," the judge observes, "that the property in suit is liable for the judgment on the ikrarnamah or security bond, notwithstanding the sale to Mirza Abud Hossein, as any such sale was subject to the incumbrance previously created on it by the vendor," the Judge, therefore, decreed, that the deed of sale to Mirza Abud Hossein should be set aside, unless the amount of plaintiff's claim under his decree on the ikrarnamah against Ajeetnarain Sing was satisfied by the Mirza.

The appeal before us is on the part of Mirza Abud Hossein, and it is urged on his behalf, that plaintiff having sued on the ikrarnamah and obtained a money decree only against Ajeetnarain, such decree gives him no preferential right to sell the property conveyed to the appellant, as no such provision was made in the decree. That plaintiff, with a money decree only, is in no better position than any other creditor, and can only avail himself of property in the possession of his debtor, but is not entitled to follow any property which his debtor had previously conveyed away to third parties in *bona fide* sales, and that the judge was wrong in holding, that the terms of the ikrarnamah reserved to plaintiff other and greater rights than those secured to him under the decree he held when suing upon it. That in fact, plaintiff now could not look beyond the decree, and that if he wished to secure any lien on the property in execution, he should have prayed to have that

lien secured to him in terms in the decree when given in his favor.

After hearing the other side in support of the judge's decision, we have no hesitation in saying, that the judgment is wrong and must be reversed.

Plaintiff sued originally on the ikrarnamah executed in his favor by Ajeetnarain Sing. In that suit he only asked for the amount due to him in lieu of the purchase money paid by him to Jypora Koer. If he supposed himself entitled under the conditions of the ikrarnamah to some provision in the decree as to his right to make this particular property subject to his claim on Ajeetnarain he should have made special mention of his wish in the prayer of his plaint, and should also have taken the precaution of making any party in possession of the village a defendant in the suit. The court could then have raised any necessary issue as to plaintiff's right to acquire the lien claimed, and for the adjudication of any question of title set up by any one else.

As it is, plaintiff merely got a money decree against Ajeetnarain, and proceeded in the usual form by attachment and sale to realize the amount from property alleged by the plaintiff, decree-holder, to be the property of his debtor. In execution of this process, the appellant set up his title he derived from Ajeetnarain, but under circumstances which do not lay the property open necessarily to Ajeetnarain's liabilities. The property was, therefore, released in execution, and we have simply to consider in this case, whether the property can be made liable for Ajeetnarain's debts or not. In considering this question at this time, we do not think it is necessary to refer at all to the conditions of the ikrarnamah. The terms of that instrument might have been proper matter for consideration in the suit plaintiff instituted upon it, but the time for considering them is past, and we are of opinion, that plaintiff having once elected to sue for a money decree upon the ikrarnamah, cannot now on the same ikrarnamah found a second action, asking that that money decree may be realized from properties on which he holds a lien under that instrument. As from the case disclosed by the defendant, appellant, there is every reason to believe he has fairly and honestly acquired the property. We reverse the decision of the judge, and dismiss plaintiff's claim, with costs throughout.

THE 30TH APRIL 1861.

H. T. RAIKES, C. B. TREVOR, and H V. BAYLEY, Esqs., Judges.

Case No. 621 of 1858.

Regular appeal from the decision of Mr. E. Lautour, Judge of 24-Pergunnahs, dated the 30th July 1858.

Jadub Sirdar and others, (Defendants,) *Appellants*,

versus

Kishenhuree Chatterjee, (Plaintiff,) and others, (Defendants,) *Respondents*.

Moulvee Aflabooddeen Mahomed, for appellant.

Baboos Baney Madhub Banerjee and *Kishenkishore Ghose*, for respondents.

Suit laid at Co.'s Rs.1,080.

THE plaintiff in this case sues for a confirmation of his rights in a mouroosee lease of 392*bs*. 10*s*., of land in mouzah Dadpore and other villages in the zemindaree of Bishonath Biswas and others.

The plaintiff avers, that he bought from the mouroosee pottahdars their rights in the lands referred to by a deed of sale, dated the 9th of Poos 1255 B. S., for a consideration of 411 Rs., and that the mouroosee pottah was at that time duly made over to him, but as the year was about then to expire, and the vendors had themselves collected a large portion of the rents on account of the instalments due in Bhadoon and Poos, a verbal agreement was made to the effect, that the vendors should pay to the zemindars the rent due for 1255 B. S., and continue in occupation for the rest of that year, that this was accordingly done, and plaintiff took possession for the year 1256 B. S., leasing the lands on the 19th of Srabun of that year to one Hullodhur Bayal, but this latter was on the 15th of Bhadoon ousted by plaintiff's vendors. Therefore, plaintiff in 1850, sued them for possession and mesne profits, making the zemindars defendants in the suit.

The plaintiff's vendors, answered, that the deed of sale was not an absolute one as stated by plaintiff, but was merely conditional, that is, although defendants admitted the execution of the deed propounded by plaintiff, which in its terms was an absolute deed of sale, still they contended, that there was at the time of its execution a verbal agreement, that if the vendors repaid the purchase money in 3 years, the deed was to be of no effect. The zemindars, defendants, pleaded that the terms of the mouroosee pottah of plaintiff's vendors, did not admit of the transfer of their rights by sale, without the consent of the zemindar. Plaintiff, however, obtained a decree from the principal sudder ameen, declaratory of the validity of his deed of sale as an absolute one,

Held that Section 16, Regulation III. of 1793 does not bar this suit, because the court find that the matter before determined, was not whether the deed of sale propounded by plaintiff was an absolute or conditional deed of sale, which is the subject matter of *this* suit, but only that the plaintiff's vendors had no power to make any transfer of their rights, without the consent of the zemindar.

Held also, that extrinsic parole evidence of an agreement contradicting, varying, adding to, or subtracting from the contents of a valid written instrument, is under the general rules of English law, inadmissible.

The Court are not, however, prepared to say, that under the custom of this country, the rule of English law would hold good in all cases.

and awarding him possession under it; but on appeal to the judge, the plaintiff was, on the 25th July 1852, nonsuited, as his plaint had not distinctly stated the boundaries of the lands for which he sued. The plaintiff appealed against the judge's order of nonsuit to this court, which, on the 21st December 1852, reversed the order, and remanded the case for trial upon its merits. On this remand, the principal sudder ameen, on the 22nd November 1853, decreed plaintiff's case on the merits, and upholding the validity of his deed as one of absolute sale. From this decision, two appeals were made to the judge, one by the plaintiff's vendors, urging that the deed was one of conditional not of absolute sale; and the other by the zemindars contending that the terms of the mouroosee pottah of plaintiff's vendors did not admit of a transfer of their rights by sale without the consent of the zemindar. On their appeal, the judge, on the 7th July 1854, decided that as the plaintiff's vendors had not as mouroosee pottahdars the power to transfer their rights by sale without the consent of the zemindar, their transfer by sale to plaintiff was of no effect, and the plaintiff's suit was accordingly dismissed. Plaintiff then made a special appeal to this Court, but before it was heard, plaintiff and the zemindars, defendants, arranged a compromise, by which the plaintiff bound himself not to make any transfer of the land without the consent of the zemindars, and they gave plaintiff a pottah, dated 10th Poos 1260 for the lands. But when the special appeal came on for hearing, this court did not decide the case on this compromise, but rejected the special appeal on the ground, that no sufficient reasons had been shewn for its admission.

The plaintiff alleges, that since the compromise with the zemindar, plaintiff has continued in possession under his lease from the zemindars, but he has thought it proper to bring this suit in order to have his rights effectually secured, by having them confirmed, as under his absolute deed of sale, and thus set at rest his vendor's contention, that that deed was one of conditional sale only; he also claims mesne profits only for the period of his dispossession, viz., from the 15th Bhadoon 1256 B. S. to the 20th of Bhadoon 1258. The parties made defendants to this suit by the plaintiff are the plaintiff's vendors, the mouroosee pottahdars, and the zemindars. The former answer, that plaintiff's suit is barred by Section 16, Regulation III. of 1793, as the same claim of plaintiff was dismissed by the judge on the 7th of July 1854, and as that order was final, inasmuch as it has never been reversed. These defendants also plead, that although the deed of sale propounded by plaintiff as an absolute one in its terms, was executed by them, still there was a verbal agreement, at the same time making the deed in fact

one of conditional sale only, viz., that the deed was not to have effect, unless defendants failed to redeem the purchase money within 3 years. Defendants also deny that plaintiff ever had possession under his alleged deed of absolute sale, or was ever dispossessed. On these pleadings the judge has held, that the suit is not barred by Section 16, Regulation III. of 1793, inasmuch as the question in the present suit was, whether the deed of plaintiff was one of absolute or conditional sale, while the only matter adjudicated by the judge on the 7th July 1854, was that the plaintiff's vendors, as mouroosee pottahdars had no power to transfer their rights by sale to third parties without the consent of the zemindar. The judge also held, that the deed of absolute sale admitted by defendants, plaintiff's vendors, to have been executed by them, could not legally be varied by a parol agreement; that even could it be so, the evidence to the agreement was not trustworthy, and that plaintiff having proved his possession and dispossession from 1256 to 1258, was entitled to the mesne profits claimed by him, the amount to be ascertained in execution.

From this decision the defendants, plaintiff's vendors appeal, urging that the finding of the judge, that the suit is not barred by Section 16, Regn. III. of 1793, is erroneous; that the evidence on the record proves the transaction with plaintiff, to have been one of the character of a conditional sale or mortgage, and not of an absolute sale; and that plaintiff never had possession; and defendants did not dispossess him.

JUDGMENT.

The first point to be decided in this appeal is, whether the suit is barred by Section 16, Regn. III. of 1793. That Section provides, that the courts are prohibited from entertaining any cause which from the production of a former decree or the records of the court shall appear to have been heard and determined by any former judge or competent court. Now on a reference to the decision of the judge of the 24-pergunnahs of the 7th July 1854, which appellant urges as the bar to this suit under the law cited, the court find, that the matter before determined was not whether the deed of sale propounded by plaintiff was an absolute or conditional deed of sale, which is the subject matter of *this* suit, but only that the plaintiff's vendors had no power to make any transfer of their rights without the consent of the zemindar. The court do not, therefore, think that the question now before us, has been determined by any previous court, so as to bar this suit under the law pleaded by appellant.

The next point is, whether the judge has rigthly ruled, that in this case a parol agreement could not be allowed to vary the character of the deed, propounded by plaintiff and admitted to have

been executed by defendants on the terms of a deed of *absolute* sale, from a deed of that nature into a deed of *conditional* sale. We are of opinion, that extrinsic parol evidence of an agreement contradicting, varying, adding to, or substracting from the contents of a valid written instrument is, under the general rule of English law, inadmissible. The Court are not, however, prepared to say, that under the custom of this country, the rule of English law would hold good in all cases. But the Court see no reason why in this case there was not, according to the general custom in this country, the usual written ikrarnamah or agreement had it been the intention of the parties to vary the deed of absolute sale into one of conditional sale. And looking to the oral testimony adduced by the appellant to prove that the transaction was one only of conditional sale, the Court can only say it is very meagre and unsatisfactory, altogether insufficient.

The plaintiff's possession is, in our opinion, proved under the terms of the deed of absolute possession propounded by him, as also his dispossession from the 15th Srabun 1256 to the 20th of Srabun 1258. We, therefore, think plaintiff entitled to a decree confirmatory of his possession under his absolute deed of sale, with mesne profits. We accordingly dismiss the defendant's appeal, with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, Esqs., Judges.

Regular appeals from the decision of Mr. J. Weston, Principal Sudder Ameen of Tirhoot, dated 30th July 1858.

No. 623 of 1858.

Ameerut Misser, for Sriram Misser, (Defendant,) *Appellant,*

versus

Dabee Persaud and Beharry Lall, (Plaintiffs,) *Respondents.*

Baboos Unnodapersaud Banerjee and *Sumbhoonath Pundit,* for appellant.

Baboos Kishenkishore Ghose and *Ramapersaud Roy,* for respondents.

Suit laid at Co.'s Rs. 8,771-10-8.

No. 622 of 1858.

Dabee Persaud and Beharry Lall, (Plaintiffs,) *Appellants,*

versus

Ameerut Misser, for Sriram Misser and others, (Defendant,) *Respondent.*

Baboos Kishenkishore Ghose and *Ramapersaud Roy,* for appellants.

Baboos Unnodapersaud Banerjee and *Sumbhoonath Pundit,* for respondent.

Suit laid at Co.'s Rs. 3,130-11-5.

PLAINTIFF sued to obtain possession of Mouzah Chuk Ajmeeree, Pergunnah Chukpanee, under a bynanamah alleged to have been executed by Mohun Misser, father of the defendant, Sriram Misser, on 8th August 1848 = 24th Srabun 1255 F. S. The terms of that deed recited, that Mohun Misser had, on its execution, received Rs. 1000, and that he agreed to complete the sale to the plaintiffs of Mouzah Ajmeeree in six months from that date, for the sum of Rs. 5,900; that if Mohun Misser failed to execute the deed of sale, the plaintiffs, after paying Rs. 1000 to a zur-i-peshgeedar and depositing the balance of Rs. 4,900 with a banker in Mozuffer-pore, might take possession of the property, and the bynanamah should be considered as a complete bill of sale to them. Plaintiffs allege, that they frequently wrote to Mohun Misser to complete the sale, and on his failing to comply with the terms of the bynanamah, they deposited Rs. 4,900 on 12th Assar 1256, and paid Rs. 1000 to the zur-i-peshgeedar on 22nd idem, and that the vendor died without taking the money from the banker with whom it was deposited, and they now sue for possession under the bynanamah.

The main answer to the claim is, that inheritance in their family is governed by the Mitakshara law; that consequently, Mohun Misser having a son living, could not sell the property which was

Held on a question of the necessity of the sale of ancestral property, under the Mitakshara law, that the only proof of necessity was, the recital in a bynanamah of a debt of 1,000 Rs. to a zur-i-peshgeedar, which was to be paid by plaintiffs, if they wished to complete the sale, and their vendor failed to execute the conveyance, that the terms of this deed shewed no such pressing necessity of payment on demand.

Held further, that only so

much of the property should be sold as is sufficient to meet the claim, and that where the whole of the estate or a larger portion than absolutely required for this purpose is sold, it must be shown by the purchaser to the satisfaction of the Court, that the money required to pay off the claim could not be raised otherwise.

their only means of subsistence without his consent, except under particular necessity, which was not the case in the present instance. In reply, the plaintiffs stated that no man sold his property without a necessity, and therefore the sale was of itself evidence of the necessity.

The principal sudder ameen held, that the existence of necessity was proved from the debt due to the zur-i-peshgeedar, and he, therefore, upheld the sale and gave a decree for possession, but refused mesne profits on the ground of delay in bringing the suit.

Two appeals have been preferred, one by the defendant on the merits, and the other by plaintiffs objecting to so much of the principal sudder ameen's order as refuses them mesne profits.

JUDGMENT.

It is not denied that under the Mitakshara law, a father is incapable of selling ancestral property without the consent of his son then living, and as it is nowhere pleaded that the property in dispute was the self-acquired property of Mohun Misser, we must consider it as admitted by both parties to be ancestral. The question, therefore, for our determination is, whether there was at the time such pressing necessity existing sufficient to authorise Mohun Misser to sell the estate. The only proof of the necessity is the recital in the bynamah of the existence of a debt of Rs. 1,000 to a certain zur-i-peshgeedar, which was to be paid by the plaintiffs if they wished to complete the sale, and their vendor failed to execute the conveyance. This debt cannot under any circumstances be looked on as a pressing necessity, for when the bynamah was drawn up, no immediate payment was demanded. That document provided for the completion of the sale in six months, and then left it at the option of the plaintiffs to pay the purchase money or not; clearly indicating hereby, that the debt to the zur-i-peshgeedar was not a pressing demand. It may be further observed, that even if there had been pressure for payment on the part of the zur-i-peshgeedar, there was no necessity for selling the estate. The proprietor could, we think, have easily raised that sum on a mortgage of the property, and even if he had been necessitated to make a sale, it was, we think, unnecessary to sell the whole property. As a trustee, the father was bound to do the best he could for the property, and if the sale of a portion were sufficient to meet the claim, a portion of the estate only should have been sold. But it is urged, that circumstances may arise which render the sale of the whole estate necessary, though the debt required to be cleared off is comparatively small. We think, however, that the proper rule in all these cases, keeping at the same time in mind, the principles laid down by the Privy Council in the case of Hunnooman Pershad Pandey is, that only so much of the property should be sold as is sufficient to meet the claim, and that where the whole of the estate

or a larger portion than absolutely required for this purpose is sold, it must be shewn by the purchaser to the satisfaction of the court, that the money required to pay off the claim could not be raised otherwise. In the present case, as there was evidently no necessity, we hold the sale to be invalid, and, reversing the decision of the principal sudder ameen, dismiss the plaintiff's suit, with costs. We also dismiss the plaintiff's appeal, with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

No. 624 of 1858.

Regular appeal from the decision of Moonshee Nazeeruddeen Khan Bahadoor, Principal Sudder Ameen of Behar, dated 6th August 1858.

Rughoobuns Sohay and others, (Plaintiffs,) *Appellants*,

versus

Mussamut Durshun Koowur and others, (Defendants,) and Mussamut Chowrasee Koowur, (Objector,) *Respondents*.

Baboo Kishenkishore Ghose and *Moonshee Ameer Ally*, for appellants.

Baboos Ramapersaud Roy, *Sumbhoonath Pundit*, and *Ashootosh Dhur*, for respondents.

a. p. k. c.

Suit laid at Co.'s Rs. 5,539-13-10-6-8.

THE plaintiff sues as reversionary heir of his nephew, Kunjbaharee, to recover from Kunjbaharee's widow, certain properties which were acquired by the plaintiff and Kunjbaharee's father, when, as it is alleged, they lived together, and had property in common. It is further alleged, that when Kunjbaharee died, the plaintiff voluntarily surrendered over the property to the widow of Kunjbaharee for her maintenance, but that as she is now wasting and dissipating the property, the plaintiff claims the right to deprive her of the use of it, and he accordingly brings the present action for that purpose.

Plaintiff sued as reversionary heir to recover from the widow of plaintiff's coparcener in a joint estate property held by the widow, and which plaintiff alleged the widow was wasting. Defendant, the widow, denies that the property was joint or was being wasted. Held, that if the plaintiff has a reversionary interest in the property, and the defendant having only a life interest in it, is dissipating it, his action would lie; but by the

The defendant denies that the property sued for was ever the joint property of the plaintiff and Kunjbaharee's father. She avers that it was self-acquired by the latter when he lived separate from the plaintiff, and she maintains her absolute right to do what she wishes with the property, at the same time that she repudiates the charge of waste.

The principal sudder ameen tried the case upon the merits, and he decided, that the property never belonged in part to the plaintiff; that it was self-acquired by the private means of the defendant's husband's father while he lived apart from the plaintiff; and that there was no proof that the defendant was wasting the property.

plaintiff's own shewing, the defendant has made no actual alienation of the property, and all the leases which she has made will survive no longer than her lifetime.

Held further, that as defendant has not shown that the widow has committed that damage or legal waste which would entitle him, taking his own facts to be proved, viz., that he is the heir; and that the defendant has only a life interest in the property, to divest her of the management and bring the property into his own possession.

The appeal must be dismissed.

The principal sudder ameen accordingly dismissed the suit, but without prejudice to the rights, whatever they might be, of the plaintiff, whenever the death of the defendant took place.

The plaintiff is dissatisfied with this decision, but looking at the case in the light presented by the plaintiff himself, we think there is good ground to impugn the judgment.

He admits that he made over the property to the defendant for the purpose of her maintenance during her life, and he claims the right to terminate this arrangement on the plea, that the defendant is wasting the property. No doubt, if the plaintiff has a reversionary interest in the property, and the defendant, having only a life interest in it, is dissipating it, his action would lie; but by the plaintiff's own showing, the defendant has made no actual alienation of the property, and all the leases which she has made will survive no longer than her life-time, supposing her of course to have only a life interest in the property. Thus the plaintiff has really no ground of action. He allows that he gave over the management of the property to the defendant, and he has not shown that the widow has committed that damage or legal waste which would entitle him, taking his own facts to be proved, viz., that he is the heir, and that the defendant has only a life interest in the property, to divest her of the management, and bring the property into his own possession.

On this view of the case we uphold the judgment of the lower court, and dismiss the appeal, with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 626 of 1858.

Regular appeal from the decision of Mr. W. S. Seton-Karr, Judge of Jessore, dated 4th August 1858.

Kashinath Chowdhry, (Plaintiff,) *Appellant,*

versus

Nubokoomar Mookerjee and others, (Defendants,) *Respondents.*

Baboos Kishenkishore Ghose and *Jugdanund Mookerjee,* for appellant.

Baboos Ramapersaud Roy, Bungseebuddun Mitter and *Gobind Chunder Mookerjee,* for respondents.

Suit laid at Co.'s Rs. 10,000.

Vide Decisions Nos. 627 and 628 of same date.

THIS was a suit to recover possession with mesne profits of a durputnee, comprising the four villages of Kandi, Teorhaut, Phoolbari and Alumdeha, granted to him by the defendant, under a pottah, dated 3rd Assar 1255 = 15th June 1848, and from which he alleges, he was ousted by the putneedar in 1260.

The defendants deny the durputnee lease and possesion under it. As the putnee claimed by the defendant, Nubokoomar has, in our decision of this date, in appeals 627 and 628, been declared spurious, it is unnecessary for us to go into this suit, for as Nubokoomar has been declared to have no title, he could give none to the plaintiff, Kashinath Chowdhry. We dismiss the appeal with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, Esqs., Judges.

Regular appeals from the decision of Mr. W. S. Seton-Karr, Judge of Jessore, dated 4th August 1858.

Case No. 627 of 1858.

Kashinath Roy Chowdhry, (Defendant,) *Appellant,*

versus

Ramnarain Mookerjee and others, (Plaintiffs,) and others, (Defendants,) *Respondents.*

Baboo Kishenkishore Ghose, Jugdanund Mookerjee, and *Mr. R. T. Allan,* for appellant.

Baboos Ramapersaud Roy, Bungseebuddun Mitter, and *Gobind Chunder Mookerjee,* for respondents.

as.

Suit laid at Co.'s Rs. 49,908-7.

Case No. 628 of 1858.

Bishomoyee Dabee, (Defendant,) *Appellant,*

versus

Ramnarain Mookerjee and others, (Plaintiff's) and others, (Defendants,) *Respondents.*

Baboos Aushootosh Chatterjee and *Chundernath Chatterjee,* and *Mr. R. T. Allan,* for appellant.

Baboos Jugdanund Mookerjee, Ramapersaud Roy, Bungseebuddun Mitter, Gobindchunder Mookerjee, and *Dwarkanath Mitter,* for respondents.

as.

Suit laid at Co.'s Rs. 49,908-7.

Held, that as in this case there is no evidence of the existence of the putnee previous to the plaintiff's first decree and defendant gave no proof of the *bona fide* nature of the putnee lease, and the

ABOUT the year 1831-32, the plaintiff, Ramnarain Mookerjee, sued Kishenmohun and Ramchurn Chatterjee, ancestor of the defendants, Nobokoomar and Bishomoyee, for the amount of a debt. The suit was settled by compromise, the defendants agreeing to pay the sum due by instalments, and a decree was passed on 30th September 1832. The sum due to the plaintiff under this decree was about Rs. 34,002, of which the defendants paid Rs. 8,919, and on the defendant's ceasing to make good his instalments, plaintiff brought a fresh suit for the balance due to him with interest,

evidence subsequent to that date is insufficient in the face of the proofs filed by plaintiff to establish the fact of its existence, the Court agree in the view taken by the judge, that it is a collusive creation, and therefore affirm his order for possession.

Held further on the question of mesne profits, that appellant, Kashinath Chowdhry, was upon his own admission of possession from 1255 to 1260, a durputneedar liable for the profits of this period. Subsequent to that time and up to the date of suit, both parties must be held liable, as in the Court's opinion the creation of the durputnee by the alleged durputnee dar was done in fraud of the plaintiff, leaving them to settle their mutual claim among themselves. The amount of mesne profits to be ascertained by local investigation and to bear interest from the date of ascertainment to date of realization.

on 28th May 1841, and obtained a decree on 24th December 1842, and in execution sold talook Badargachea, comprising sixteen villages, the property of the defendants, Ramchurn Chatterjee and Kishen Mohun, and purchased it himself for Rs. 13,000 on 15th Kartick 1235 = 30th October 1848. On attempting to take possession, the plaintiff found himself opposed by two parties calling themselves putneedars, one of them claiming twelve of the villages as included in his putnee, from Ramchurn, and the other Nobokoomar represented by his wife, Bishomoyee, claiming the other four villages, Teorhaut, Phoolbari, Alumdeha, and Kandi, as comprised within his putnee, also derived from Ramchurn under a deed dated 5th Bhadun 1226 = 20th August 1819, and given by Nobokoomar in durputnee to Kashinath Chowdhry under a deed of 3rd Assin 1255 = 17th September 1848.

The present suit relates only to the smaller putnee claimed by Nobokoomar, which the plaintiff sues to set aside as collusively created by Ramchurn Chatterjee in defraud of creditors. The judge considering this to be the case, has given a decree or possession, and made both putneedar and durputneedar liable to be responsible, because in his opinion both parties did their best to keep the plaintiff out of his rights.

Two appeals have been preferred from this decision. One by Bishomoyee on the merits, the other by Kashinath Chowdhry, the durputneedar, who urges that he cannot be held jointly liable for the whole of the mesne profits, but only for such period as the estate was in his possession, he having been ousted by the putneedar in 1260, and having instituted a separate action to recover possession. The result of that action depends upon the decision come to by the court in this appeal, and it having been dismissed by the judge, is now also in appeal before this court.

JUDGMENT.

It appears that Ramchurn Chatterjee, the original proprietor of talook Badargachea, had two sons, Kashinath Chatterjea, deceased, Hurinath Chatterjea, and a daughter Kumla. Nobokoomar, defendant in this case, is the son of Kumla. He married Bishomoyee, and his second daughter by her, married Muthooranath Chowdhry, son of Kashinath Chowdhry, another defendant in this case. It is alleged that Ramchurn Chatterjee, in consideration of Rs. 1,000, gave a putnee of four villages, Kandi, Teorhaut, Phoolbari and Alumdeha, to his grandson, Nobokoomar, on 5th Bhadun 1226 = 20th August 1819, and Kashinath Chowdhry, the second defendant alleges, that he got a durputnee from Nobokoomar on 3rd Assin 1255 = 17th September 1848. Nobokoomar is said to be of weak intellect, and all his affairs are managed by his wife, Bishomoyee.

The plaintiff sues to set aside the putnee and durptnee on the allegation that Ramchurn created the former in defraud of creditors, he

retaining a beneficial interest in it, and in support of his allegation plaintiff has filed certain decisions and proceedings which give strong *primâ facie* proof of the possession of Ramchurn subsequent to the creation of the putnee, sufficient to throw the *onus probandi* on the defendants. There is a suit brought by Ramchurn for rent in 1832, three decisions of the Moonsiff of Kalapole, in two of which Ramchurn was the plaintiff and sued ryots of this putnee for rent. A statement in the plaint of Rajender, grandson of Ramcoomar, in which he makes mention of a *benamee* putnee in the name of Nobokoomar, while the collections and possession remained in Ramchurn. On 26th Assar 1237 = 9th July 1830, Ramchurn sold his rights and interests in the talook to his brother, Krishnomohun, in liquidation of a debt for Rs. 50,000, and in the bill of sale which is admitted to be genuine, not a word is mentioned of the existence of the putnee, and subsequent to the sale, we find the Naib of Krishnomohun in 1246, bringing suits for rent against ryots of Teorhaut, a right he could not have exercised, had their been a *bona fide* putnee in existence at the time. The plaintiff has filed other papers, which we think it unnecessary to mention here, those above recited being sufficient in our opinion to disprove *primâ facie* the existence of the putnee, and to throw upon the putneedar the burden of proving its validity. Now what is the evidence with which defendant tries to support his tenure. He files two or three decisions of the civil courts for rent, of a date subsequent to the plaintiff's purchase, in which Nobokoomar is styled the putneedar, and in one, Ramchurn is called the talookdar, and Nobokoomar the putneedar; the decision of the magistrate in the Act. IV. case proving the possession of Nobokoomar as putneedar; but as the object of the present suit is to set aside that award, it cannot be looked upon as any proof in his favour. The oral testimony to prove the execution of the putnee lease is altogether unworthy of credit, and we find no evidence of its existence from 1819, the alleged year of its creation to 1835, when the plaintiff obtained his first decree against Ramchurn and Krishnomohun, and it is singular that for the space of fourteen years previous to the date of that decree, during which the putnee is said to have been in existence, no reliable evidence of the fact can be produced. The decisions of the civil court filed by the defendants are of little weight, for, if collusion were the object, Nubokoomar would, of course, be styled the putneedar, and Ramchurn the talookdar. We find, therefore, that there is no evidence of the existence of the putnee previous to the plaintiff's first decree, and defendant gave no proof of the *bona fide* nature of the putnee lease, and the evidence subsequent to that date is insufficient in the face of the proofs filed by plaintiff to establish the fact of its existence, the Court agree in the view taken by the judge that it is a collusive creation, and therefore affirm his order for possession.

On the question of mesne profits, we consider Kashinath Chowdhry upon his own admission of possession from 1255 to 1260 as durputneedar, liable for the profits of this period. Subsequent to that time, and up to the date of suit, both parties must be held liable, as in the Court's opinion, the creation of the durputnee by the alleged putneedar was done in fraud of the plaintiff, leaving them to settle their mutual claim among themselves. The amount of mesne profits to be ascertained by local investigation, and to bear interest from the date of ascertainment to date of realization. Plaintiff's costs in the suit will be borne by the defendants, who will bear their own costs respectively, and both appeals are dismissed with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 644 of 1858.

Regular appeal from the decision of Mr. O. W. Malet, Judge of Beerbhoom, dated 10th August 1858.

Musst. Soonder Coomaree Dabea, (one of the Defendants,) *Appellant,*

versus

Ladlydoss Mohunto Moharaj, (Plaintiff,) and others, (Defendants,) *Respondents.*

Baboo Sumbhoonath Pundit, for appellant.

Baboos Kishenkishore Ghose and *Jugdanund Mookerjee*, for respondents.

Suit laid at Co.'s Rs. 2,526-8-1.

Held, that the transaction between plaintiff and defendant was in the nature of a conditional sale, that the notice of foreclosure has been admittedly issued in proper legal form, and the year of grace has expired; that the defendants have not paid the sums borrowed, and that consequently plaintiff is entitled as absolute owner to the property mortgaged to the possession

THE plaintiff in this case Gopal Doss Mohunt, sues the defendant, Soonder Coomaree Dabea and others, for possession of an 8-annas share of certain free-rent garden land with trees, which was mortgaged to him and which has become foreclosed.

The plaintiff alleges that for the purpose of obtaining 1,000 Rs., to pay the government revenue due on her zemindaree, defendant executed in his favor a deed, dated 14th Jeyt 1255, by which she bound herself to repay the whole amount borrowed on or before the month of Aghrun of the same year with interest, mortgaging the property in suit as security for the debt; and that it was conditioned, that the payment made in liquidation should be endorsed on the back of the deed at the time of the making of the same; that no plea of payments other than those entered on the back of the bond should be entered up, and that in case of non-payment of the entire sum with interest, plaintiff was at liberty to foreclose the mortgage; that as defendants have failed to pay any portion of the amount borrowed within the time specified in the deed, and as the mortgage has become foreclosed by the issue of notice under Regulation XVII. of

1806, and the expiry of the year of grace, plaintiff now sues for possession of the property which has become his absolutely. sued for by him. Decision of the Judge affirmed with costs.

The principal defendant, Musst. Soonder Coomaree Dabea admits the execution of the deed, but urges that instrument is not a deed of conditional sale, but only a mere bond; that the plaintiff taking advantage of her sex, succeeded in colluding with the writer of the bond, and in introducing therein the terms relative to the foreclosure of the sale on the non-payment of the money within the stipulated period; that these terms in such a deed cannot be sustained; that moreover, plaintiff has realized 955-7-5 from the usufruct of Mehal Rota, and have not endorsed the receipt of it on the back of the bond; that altogether the plaintiff's suit should be dismissed with costs. The other defendants did not appear.

The judge considered that the plaintiff had proved his claim, and gave him a decree in the terms of the prayer of his plaint, with all the costs of suit.

That defendant below, Soonder Coomaree, now comes up in appeal to this court and urges, that the decision of the judge is opposed to the evidence, oral and documentary, on the record, and consequently, that it should be reversed.

That the terms of the deed upon which the present suit is based, are such as to constitute it a deed of conditional sale, is not denied by the appellant. The attempt, however, to get rid of the effect of instrument, by pleading that the clause regarding foreclosure was inserted by fraud and without her knowledge. Now, of the correctness of this plea, she offers no proof at all. The deed, therefore, must stand as a *bona fide* deed of conditional sale, and the only remaining point is, whether the plaintiff, respondent, entitled to possession by reason of non-payment on the part of the appellant.

Appellant urges, that plaintiff, respondent, has received 955-7-8 from the usufruct of another property, and has not given them credit for the same. Now admitting, that the plaintiff had received this payment, a payment which we agree with the judge in thinking is not proved by the evidence, it would not cover plaintiff's entire claim, and therefore it would be no valid answer to the plaintiff's present suit, for if after the issue of notice of foreclosure, and the expiry of the year of grace, one pice remains due from the mortgagor, the mortgagees are entitled to possession.

As then the original transaction was one of conditional sale, as the notice of foreclosure under Regulation XVII. of 1806, has admittedly been formally issued, and the year of grace has expired, as moreover, it is quite clear that the mortgagors have not paid the sum on account of which the property was mortgaged, the respondent is entitled to possession of the mortgaged property, which has become his absolutely. We, therefore, affirm the judge's decision with costs.

THE 13TH MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 661 of 1858.

Regular appeal from the decision of Baboo Sreenath Biddyabagish, Pundit Roy Bahadoor, Principal Sudder Ameen of Backergunge, dated 10th November 1857.

Gholam Mowla and others, (Plaintiffs,) *Appellants,*

versus

Gooroo Doss Roy Chowdhry and others, (Defendants,) *Respondents.*

Moulvy Syud Murhumut Hossein and *Moonshee Ameer Ally*, for appellants.

Baboos Ramapersaud Roy, Kishenkishore Ghose, and *Kallymohun Doss* and *Mr. R. T. Allan*, for respondents.

Suit laid at Co.'s Rs. 5,815-8as. 3p. 4k.

Held, that if plaintiffs had attained majority in Falgoon 1251 or the 11th February 1845, they would have been in time if they filed their suit on the 11th February 1857, but they actually filed it on the 27th August 1856, and limitation has not therefore been exceeded.

Held that the plaintiffs do not say that they attained the age of 18 in 1251, but that they were of full age then, and it is altogether opposed to equity and to the practice of our courts to put the most unfavorable construction upon a statement, when the effect of so doing is to throw a suitor unheard out of court.

THE plaintiffs sue to set aside a summary decree and sale, and to recover possession of some jote lands.

The question upon which the decision of the lower court turned was, whether from the time of the plaintiffs' attaining their majority, they had brought their suit within 12 years.

The lower court held, that as in their petition to be allowed to sue as paupers, the plaintiffs admitted that they arrived at full age in 1251, and as by the universal understanding of the people, 18 years was considered the age of majority, it inferred, that the plaintiffs meant that they were 18 years old in 1251, as, however, 16 and not 18 years, is the age of minority of classes other than those paying revenue to government direct; it looked upon it as clear that the plaintiffs had not instituted their suit in time and and on that ground dismissed it.

Now taking the plaintiffs at their word, that they attained majority in Falgoon 1251 or the 11th February 1845, they would have been in time if they filed their suit on the 11th February 1857, but they actually filed it on the 27th August 1856, and limitation has not therefore been exceeded.

As to the inference which the principal sudder ameen has drawn, that the plaintiffs, when they said they arrived at full age in 1251, intended it to be understood, that they were 18 years old then, we can find no warrant for this. The petition alluded to does not say that the plaintiffs attained the age of 18 in 1251, but that they were of full age then, and it is altogether opposed to equity and to the practice of our courts to put the most unfavorable construction upon a statement, when the effect of so doing is to throw a suitor unheard out of court, even if the principal sudder ameen was right in his conjecture, and that Golam Mowla, the elder of the plaintiffs,

was 18 years old in 1251, there was still the case of Dowlut Banoo to be considered, and as she is admittedly 2 if not 3 years younger than Golam Mowla, the objection could not be applied to her, however, it might affect her co-plaintiff that her suit was not in time.

In a supplemental petition which the plaintiffs filed, they removed all doubt as to their ages. In the plaint in the regular suit, they have in like manner stated the dates when they were respectively born, and they have given both oral and written evidence in support of their own plea, that up to 1251 neither of them had arrived at majority.

The defendant avers, that Golam Mowla was born in 1229, which would make him out to be of full age in 1244, and to be about 38 now. But this individual being present in court, does not appear to us to be more than 30 years old now, and by a decision of the civil court in which the defendant's father sued the guardian of the plaintiffs in 1844, it appears that the plaint in that case expressly stated, that Golam Mowla was then in his minority. If the defendant's statement now made, viz., that Golam Mowla was born in 1229, has any truth in it, this person was in 1844 of the age of 22 years, and it is out of the question to suppose, that one so far out of his minority would have been styled a minor, or would have allowed his mother to conduct his law proceedings for him.

Looking then to our judgment as to the age of Golam Mowla, to the evidence he has himself adduced, and to the act of the defendant's predecessor himself, we think, that the plaintiff's statement as to his age is correct, and that 12 years have not elapsed between the date when he attained his majority and the date when his suit was filed. As the necessary evidence for the decision of the case upon the merits is not on the record, we remand the suit that it may be tried and disposed of upon the other issues raised in the pleadings.

THE 29TH MAY 1861.

C. B. TREVOR and H. V. BAYLEY, ESQRS., Judges.

Special appeals from the decisions of Moulvy Abdool Azeez Khan, Principal Sudder Ameen of Purneah, dated respectively the 12*th*, 16*th, and* 27*th December* 1859; 24*th and* 30*th January; 22nd and* 27*th February, and* 30*th March* 1860; *affirming the decree in No.* 848, *and reversing those in the remaining cases of Baboo Hurchunder Chatterjee, Acting Sudder Moonsiff of that District, dated respectively the* 25*th June* 1855; 13*th*, 25*th, and* 30*th June; and* 13*th and* 26*th July* 1858.

Case No. 310 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheik Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvee Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 337 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Mussamut Bhugwanoo, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 338 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvee Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 339 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvee Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 340 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Mosaheb Ally, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 341 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Soojaet Ally, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 342 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Soojaet Ally, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 362 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 364 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Mosaheb Ally and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 394 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Soojaet Ally, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Cases Nos. 395 and 397 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 396 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Mussamut Bhugwanoo, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 398 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 399 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Mosaheb Ally and others, (Defendants,) *Respondents.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 400 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Mosaheb Ally, (Defendant,) *Respondent.*

Moulvy Lootfoor Ruhman, for appellant.

Baboo Jugdanund Mookerjee, for respondent.

Case No. 760 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Mussamut Bhugwanoo and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 761 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheikh Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 762 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheik Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

Case No. 848 of 1860.

Ram Chand, (Plaintiff,) *Appellant,*

versus

Sheik Dyahuntoollah and others, (Defendants,) *Respondents.*

Moulvy Ahmed Ally, for appellant.

Baboo Jugdanund Mookerjee, for respondents.

In appeal, the pleas were that the lower appellate court had at the hearing of the appeal taken additional evidence, which under the law current before the passing of Act VIII. of 1859, it was not competent to do, inasmuch as an appellate court can give its judgment in appeal only upon the record as it comes before it from the lower court. That even if by Section 355, Act VIII. of 1859, the lower appellate court is competent to take such additional evidence, that court must, in order to enable it to admit the same, record its reasons for doing so, which has not been done in this case.

Held on the first plea, that the particular

THE pleas taken in these special appeals, are :—

I. That the lower appellate court has, at the hearing of the appeal, taken additional evidence, which under the law current before the passing of Act VIII. of 1859, it was not competent to do, inasmuch as an appellate court can give its judgment in appeal only upon the record as it comes before it from the lower court.

II. That even if by Section 355, Act VIII. of 1859, the lower appellate court is competent to take such additional evidence, that court must, in order to enable it to admit the same, record its reasons for doing so, which has not been done in this case.

JUDGMENT.

The decision of the court of first instance in the suit is dated the 25th of June 1858, that of the lower appellate court from which this special appeal is brought, is dated the 12th December 1859, subsequent to the passing of Act VIII. of 1859. Thus the particular Act of procedure under which the lower appellate court acted, and against which this special appeal is brought, was the New Code, and that Code, by Sections 355 and 356, clearly gives appellate courts the power to admit additional evidence. Statutes enacting substantive law are not retrospective, but Statutes which merely alter the proceedings are so, and apply to all cases instituted previous to and pending at the time of their passing, unless they are restricted by their terms to future cases alone, or take away a right which a party previously had. The *first* plea as to the old law is, therefore, untenable.

On the *second* plea we observe, that it is enacted by Section 355, Act VIII. of 1859, that "if the appellate court require any exhibits "to be produced or witnesses examined to enable it to pronounce a "satisfactory judgment or for any substantial cause, the appellate "court may allow additional exhibits to be received and any necessary "witnesses to be examined, whether such witnesses shall have "been previously examined in the court below or not, provided that "whenever additional evidence is admitted by an appellate court, "the reasons for the admission shall be recorded on the proceedings "of such court." Now it is admitted and indisputable here, that the lower appellate court did admit additional evidence, and that it did not record its reasons for so doing, we do not, however, consider that on this account, the judgment of the lower court should be reversed and set aside. That court omitted an act of form in its procedure, but by so doing no illegality was involved. The Section cited does not prescribe that the superior appellate court can question the sufficiency or otherwise of the reasons which the lower appellate court might record for admitting additional evidence, nor in the court's opinion will the omission of a point of form in ordinary way invalidate the evidence taken under a power given by law to the courts below. The court, however, thinks, that the lower courts should always be very careful in putting on the record the formal proceeding required by Section 355, Act VIII. of 1859.

Under these circumstances, we reject these special appeals, with costs.

Held on the second plea, that it is enacted by Section 355, Act VIII. of 1859, that "if the appellate court require any exhibits to be produced or witnesses examined to enable it to pronounce a satisfactory judgment, or for any substantial cause, the appellate court may allow additional exhibits to be received, and any necessary witnesses to be examined, whether such witnesses shall have been previously examined in the court below or not, provided that whenever additional evidence is admitted by an appellate court, the reasons for the admission shall be recorded on the proceedings of such court."

But that this was not sufficient ground, that on this account the judgment of the lower court should be reversed and set aside. That court omitted an act of form in its procedure, but by so doing no illegality was involved. The Section cited does not prescribe that the superior appellate court can question the sufficiency or otherwise of the reasons which the lower appellate court might record for admitting additional evidence. Nor in this Court's opinion will the omission of a point of form ordinarily invalidate the evidence taken under a power given by law to the courts below. This Court, however, thinks that the lower courts should always be very careful in putting on the record the formal proceeding required by Section 355, Act VIII. of 1859.

THE 31ST MAY 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 620 of 1858.

Regular appeal from the decision of Mr. P. Taylor, Judge of West Burdwan, dated 28th June 1858.

Josoda Nundun, *alias* Bhyro Chunder Newgee and others, (Defendants,) *Appellants,*

versus

Gopal Doss Mohunt, (Plaintiff,) *Respondent.*

Moonshee Ameer Ally and *Baboo Bhoobun Mohun Roy,* for appellants.
Baboos Kishenkishore Ghose, Ramapersaud Roy, and *Jugdanund Mookerjee,* for respondent.

Suit laid at Co.'s Rs. 14,412-7.

PLAINTIFF, Gopal Doss Mohunt, and after his death, Ladlee Doss Mohunt, sued Jasoda Nundun, *alias* Bhyro Chunder Newgee and others, for the resumption of 261 beegahs and 4 cottahs of land, appertaining to mouzahs Biddyanundpore and Manja, talook lot Mancha, Pergunnah Burrohazaree, Turaff Singhasary.

Held in accordance with the opinion of the lower court that defendants have failed to prove the validity of the lakhiraj tenure set up by them, and its existence since 1790 under a title believed to be valid.

Held also as to the 52 beegahs of confirmed lakhiraj land alleged by defendant to be included in the plaint; that the decision in its present state is defective, and that the case must be remanded for a mofussil investigation as to them.

The plaintiff alleges that the talook in which the lands in suit are situated, was formerly held by the defendants, either in their own name or those of other persons; that taking advantage of their knowledge thereof, and influence therein, they, after plaintiff purchased it at public sale in the month of Jeyt 1256, dispossessed him of the lands in suit in Assar of the same year, on the plea of their being lakhiraj, and have ever since refused to pay rent; that as the claim of the plaintiff to hold this as lakhiraj is fraudulent, plaintiff brings the present action.

The defendants plead, that they have held the lands as lakhiraj for more than 60 years, and consequently, that plaintiffs are out of court under the statute of limitations, and on the merits they urge, the lands in suit are their valid lakhiraj lands.

The deputy collector to whom the case was referred for report under Section 30, Reg. II. of 1819, considered that the right of the plaintiff to hold 194-17-2 out of the 261 lakhiraj had been satisfactorily proved by the documentary evidence adduced by them, and that 66-6-2 alone belonged to the plaintiff as mâl.

After most minutely and carefully noting the evidence bearing upon the lands entered in each of the 28 parcels into which the lands were separated, the judge thought that the oral and documentary evidence of the defendants had entirely failed to prove that any part of the disputed land was lakhiraj, whilst that of the plaintiff which appeared to him worthy of all credence, demonstrated most convincingly that it must be mâl, he was, therefore, of opini-

on, that under no view could the statute of limitation apply to the case. He, therefore, decreed the plaintiff's claim with all costs.

An appeal has now been preferred to this court by the defendants below against the decision of the judge passed adversely to them; they urge, that the suit is barred by limitation; that moreover the jummabundee and *Chars* of Messrs. Hasselridge and Dawson, and also the Taidads and Roll-book of the collectorate, clearly prove their case; that the rejection of the Taidad, because they are not signed by any authority is unreasonable, it not being the practice for public officers to sign Taidads; that the correspondence of the Char with the Taidads and Roll-books establish their case, which is only rejected in consequence of the judge holding the Char and Taidad to be forged; that again within the land sued for are 52 beegahs of their confirmed lakhiraj land, amounting altogether to 75 beegahs, and admitted to be in their possession in the plaint, and that the judge, though this fact was pleaded before him, he never enquired fully into it; that altogether the judge's decision is contrary to evidence and justice, and should be reversed.

We have gone over the evidence which the judge has, with such elaborate care, detailed in his judgment, and the result at which we arrive is exactly similar with that reached by the judge. Without again travelling over the ground in detail, we will say generally, that we are not satisfied with the evidence on the record as showing that defendants have been in possession of the land as lakhiraj under a *bona fide* title, believed it to be valid from 1790, neither are we satisfied with the evidence as to the validity of the title set up by the defendants. It appears that it was formerly the custom, when enquiries were made regarding lakhiraj lands, for parties to exhibit their sunnuds; this document was then given back, and a Char also, and the officer entered the particulars of the sunnud in a Roll-book. Admitting even for argument's sake, that the Char and Sunnud and Taidads are what they are represented to be, we have no certainty that they refer to the lands now in dispute, and the Chars and Sunnuds in no sense can be said to coincide with the Roll-book, for it contains the mention of no villages; but it is unnecessary to carry this reasoning further, for we are not satisfied that the Chars, Sunnuds and Taidads filed are genuine documents, but we see strong reasons for supposing, that they have been fabricated to meet present requirements; thus the evidence which the defendants have produced to prove their case, with the exception of a point to be noticed below, entirely in the court's opinion fails.

Regarding the 52 beegahs out of the 75 of confirmed lakhiraj land admitted, belong to defendants, which they state to be within the area claimed by the plaintiff, the decision of the judge in its present conditional form is manifestly defective, and altogether the plea raised by the defendants as to them, must be answered

previously to a decree being passed, and it can only be answered by a mofussil investigation; it seems that when the resumption proceeding which ended in the release of the lands, were pending, a measurement of the lands took place, no difficulty will, therefore, occur in ascertaining whether the lands formerly released to the defendants are comprised within the present plaint or not.

We, therefore, affirm the judge's decision as to all the lands claimed by the plaintiffs, as held by them under a valid lakhiraj title in the present suit, but we direct him to send an ameen into the mofussil with the chittas of resumption, the ameen will then ascertain whether any or how much of defendants' confirmed lakhiraj land is included within the present plaint; if the whole 52 beegahs are comprised in it, as stated by defendants, plaintiff's claim as to that area must be dismissed, with costs; if any portion of it be within it, the plaintiff's suit as to that portion must be dismissed with costs, and the rest be decreed to him; and if none fall within it, then plaintiff's whole case must be decreed with costs.

Mr. C. Steer.—I concur in the view taken by my colleagues in this case.

THE 8TH JUNE 1861.

C. B. TREVOR, G. LOCH, and C. STEER, ESQS., Judges.

Case No. 348 of 1858.

Regular appeal from the decision of Mr. E. DaCosta, Principal Sudder Ameen of Tirhoot, dated 30th June 1857.

Musst. Junnuk Kishoree Koonwur, sister and guardian of Baboo Kishenkishore Narain Sing, minor, (Plaintiff,) *Appellant,*

versus

Baboo Rughoonundun Sing and others, (Defendants,) *Respondents.*

Baboos Unnodapersaud Banerjee and *Kally Prosunno Dutt, Moulvee Murhummut Hossein,* and *Mr. W. Ritchie,* for appellant.

Baboos Ramapersaud Roy, Kishenkishore Ghose, Sumbhoonath Pundit, Onookoolchunder Mookerjee, and *Ramgopaul Ghose, Mr. R. T. Allan,* and *Moonshee Ameer Ally,* for respondents.

Suit laid at Co.'s Rs. 97,500-6-8.

Messrs. C. B. Trevor and G. Loch.—MUSST. Brij Koonwur, paternal grand-mother and after her demise Musst. Junnuk Kishoree Koonwur, sister and guardian of Kishenkishore Narain, plaintiff, sues Bhugwutnarain Sing, 1st party, Ramnarain Sing and Rughoonundun Sing and Hurpurkas Narain Sing and others, 2nd party, and various others, for the cancelment of certain deeds of sale illegally made and without warrant of law.

Plaintiff alleges that Mohesh Jha and Omur Jha were the ancestors of the different parties before the court, and brothers and sons of Bhugruthia Jha, the common ancestor. That both of them had amassed large property whilst living together; that Mohesh Jha had an only son, named Hurdeonarain Jha, who died childless; that Omur Jha had one son, Kebulkishore, who succeeded to the whole estate; that Kebulkishore had three sons, Mohendurnarain, Ramnarain and Lutchmeenarain. Mohendurnarain had two sons, Bhugwutnarain, the father of plaintiff, and Ramonoogro Sing. That Ramnarain had two sons, Rughoonundun and Hurpurkas, defendants in this case; and Lutchmeenarain had a son, Bishenpurkas, defendant; that the three brothers lived together till 1238; that in 1239 or 1832 Lutchmeenarain separated himself from his brothers, and they divided all the property into three parts, and each took his share; that both Mohendurnarain and Ramnarain still lived in commensality. That in 1241 or 1834, Mohendurnarain died, leaving his eldest son of age, and his youngest a minor; that after his death in Assar 1242, Bhugwutnarain separated himself from Ramnarain Sing and retained possession of one-third share of the property, partly on his own account and partly as guardian of his minor brother, Ramonoogro Sing; that before the separation of Baboo Ramnarain Sing, there were lacs of Rupees and other articles left by his grandfather and father, which were divided between Baboos Ramnarain Sing

Held, that under the law of Mithila as well as of the Metakshara, a father is only joint owner with his sons of ancestral estate, and can only exercise the power of alienation in the case of a minor son existing at the time, under circumstances of legal necessity.

Held also, that the debts contracted by plaintiff's father are not shewn to be of *such a nature* as to absolve the son from the obligation to pay them.

Held further that, with the exception of five of the sales made in execution of decrees of court, all the remaining sales for the reversal of which the present suit is brought, were

not made under circumstances showing any legal necessity for them, and they are consequently invalid under Hindoo Law. Case decided accordingly, both parties under circumstances to bear their own costs.

and Bhugwutnarain Sing, according to the former deed of partition; that after the separation Bhugwutnarain, on account of there being no one to take care of him, began to live extravagantly; that on Ramonoogro arriving at his majority, and seeing Bhugwutnarain Sing living extravagantly, he separated himself from him in 1249, and held possession of his $\frac{1}{6}$ share, and Bhugwutnarain held his $\frac{1}{6}$ share of the ancestral property; that at the time of the death of Mohendurnarain no debts were due from any one, but he left much cash and other valuables, and had an estate also bringing in a large income, and the share accruing to plaintiff brought in at least a net income of 30,000 Rs.; that on Bhugwutnarain becoming extravagant, it was good opportunity for Ramnarain Sing, defendant, and other defendants to entangle him in difficulties and take his property; that for small sums of money they instigated and caused him to execute bonds for large amounts in the name of other individuals; that when these nominal mahajuns obtained their decrees, they themselves began to purchase them; that again they instigated Bhugwutnarain to execute other bonds in their own names, lending him small sums of money, but not giving him any account of the same, and then caused him to execute bonds for double, treble, four and five times the amount of the sums actually paid to him and obtained decrees on the same; that they also instigated other creditors to sue and obtain decrees for false debts; that then many mouzahs were brought to sale, and 14 villages were sold on different dates and years, of which 9 villages of large value were purchased by Ramnarain, Rughoonundun Sing and others, second party defendants, one by Bishenpurkas Sing in the name of Nursing Thakore, his own servant, and four by the other defendants as is given in schedule below; that moreover, they caused the said Bhugwutnarain to execute many deeds of sale for many villages of large values inserting large sums of money in them, some in the names of defendants of the scond party, and some in the fictitious names of their servants; that in short between 1257 and 1261 all the ancestral and paternal property of plaintiff's father was dissipated; that to strengthen their fraud and to screen their evil acts, they have prepared a deed of gift (oteanamah) of 5 villages in plaintiff's favour, alleging that it was executed in his, plaintiff's favour, by his father at the ceremonies performed shortly after his birth, and have registered it, hoping thereby that the claim of plaintiff to his ancestral estate by the reversal of the deeds of sale, would not be made. That the present suit is instituted consequently to establish the reversionary right of the minor plaintiff to the property alleged to have been sold to the defendant by the reversal of the deed of sale, as having been made by the minor's father contrary to the law of Mithila, without any necessity, but merely to satisfy his present extravagancies, and by the cancelment of the alleged deeds of gift to himself.

The defendants substantially plead that in the Mithila law, the father is not prohibited from selling ancestral properties at his pleasure, provided he leaves sufficient for the maintenance of the family, which has not been done in the present case, and that on this point that law differs from the Metakshara; that even were the Metakshara law prevalent in Tirhoot and applicable to this case, the sales would be valid and not liable to be set aside, as they were made for debts of the father, for which the estate is liable; that the allegation, that the defendants inveigled into dissipation the father of the minor with a view of getting possession of his property, is false; that they, defendants, seeing the minor's father in difficulty, with a view of preventing the properties going into the hands of strangers, purchased them themselves. That in this there has been no fraud and illegality, and the present suit, therefore, should be dismissed.

The principal sudder ameem remarks in his judgment as follows:—The plaintiff sues to set aside certain sales on the allegation, that his father, Bhugwutnarain Sing, had alienated the property illegally, and had squandered the proceeds in "playing and toying." On the other hand the defendants, amongst other pleas, maintain the validity of the said sales on two principal grounds, 1st, that the *whole* ancestral property, the alienation of which is prohibited by the Mithila shasters, not having been sold, the father was, by the Mithila shasters, competent to alienate a portion of it after reserving, as he has done, in the present instance, sufficient for the maintenance of the family, and 2nd, that the plaintiff's plea that the sale proceeds had been lavishly expended, was unfounded. "Now, I am of opinion," proceeds the principal sudder ameen, looking to the competency of the plaintiff's father to sell the property at all under the Hindoo law current in Mithila, "that with the exception of two items, viz. the one, the deed of gift in plaintiff's own favour of mouzah Sonsur, and the other, a deed of nominal sale of four dwelling houses, situated in the said village in favor of Ramnath Karpur; the sales of the remaining landed property specified in the plaint, which does not consist of the whole of plaintiff's ancestral property, belonging to plaintiff's father, are valid, a portion more than sufficient to meet the maintenance of the family having been reserved. The copies of precedents and bywustahs which have been put on record by the plaintiff, and on which he relies, cannot govern the decision in the present case for the following reasons: 1st, because they restrict the father's competency to make any alienation without the son's consent, a plea which has not been advanced by the plaintiff, nor made the basis of the present claim, and 2ndly, because the said precedents and bywustahs are all founded on the authority of the Metakshara and other authorities prevailing in Benares and other countries in which the shasters current in Benares are respected. In this district, the Mithila shasters are

followed, and respect is paid to them, viz., Vivada Chintamoni, the Vivada Ratnacara and others; and as the religious ceremonies performed in the family are admittedly regulated by the Mithila shasters, this case must be governed by them." The principal sudder ameen then proceeded to remark on certain decisions of the Tirhoot court and bywustahs of the Pundits, and concluded by holding, that all the sales made were within the competency of plaintiff's father under the Mithila law, more than enough property remaining for the maintenance of the family. As to the allegation forming the second issue of the plaintiff, that the sales had been effected to supply the dissipation of his father, that the principal sudder ameen considered as not proved, the oral evidence adduced, being in his opinion not worthy of credit, inconclusive, conflicting and unsatisfactory. The statement of one witness invalidates that of another; moreover, the proofs adduced by the defendants invalidating the above allegation predominate; moreover it was decided in a case in the Sudder Court, in 1841, that whether the purpose for which the sale was made was proper or not, when the debt had been proved in court, and a decree passed for the amount which had become final, the ancestral property could not be saved from sale by a suit brought by the son. With regard to the oteanamah in favour of the plaintiff, the principal sudder ameen remarks, that although it was clear from the foregoing circumstances, that a father was competent under the general power above adverted to, to execute such document, still as the plaintiff himself applied for its cancelment, there could be no objection to it. As to the deed of the sale of the dwelling houses written by plaintiff's father in favour of Ramnath Karpur, it is beyond doubt, illegal, and must, therefore, be set aside according to the text of "Catyayana," in page 312 of Macnaghten's Hindoo Law, volume II., houses must be excepted, for a father is not competent to sell them. The principal sudder ameen, therefore, passed a decree, setting aside the oteanamah, and deed of sale of the dwelling houses and upheld all the other public and private sales with costs in proportion to the amount decreed and dismissed. The costs of all the other defendants, except Bhugwutnarain and Ramnarain Sing, being made chargeable to the plaintiff.

From the decision of the principal sudder ameen adverse to him, an appeal has now been preferred to this Court by the plaintiff below. He in his appeal petition, calls in question the law of Mithila, as laid down by the principal sudder ameen, submits that as to the power of alienation by a father with a minor son living, it is identical with the law of the Mětakshara, and that that power can only be exercised within certain limitations, and under certain circumstances not present in the case before the Court; and that, moreover, in the present case, the purposes of the

sales were of an immoral nature not sanctioned by Hindoo Law, that consequently the decree of the principal sudder ameen should be reversed, except as to the reversal of the deed of gift to plaintiff and the sale of the dwelling houses.

The issues raised on the pleadings in this suit are :—

1st. Has a father, under the law of Mithila which prevails in Tirhoot, an absolute power to dispose of ancestral property as he pleases, notwithstanding that a son is living, or is he only a joint-owner with his sons, and therefore, with a power of alienation to be exercised, in the case of a son who has reached his majority, only with his consent, and in the case of minor sons, as in this suit, only on a legal necessity arising?

2nd. If he has only a restricted power, were the debts for which the alienations took place of such a nature as under Hindoo Law, to render the property in which the sons have a vested interest under no circumstances liable?

3rd. If not of such a nature, was there any such real or apparent necessity for the sale as justified the vendor in selling, and the vendees in purchasing property not absolutely the property of the seller, but held by him, partly as his own and partly as trustee for his minor son.

It was contended by the learned Advocate General on the first issue, that the general rule of Hindoo Law is, that a father with sons has only a restricted right of alienation of any part of the ancestral property. That the strong presumption is in favour of the prevalence everywhere of the general rule, and unless a party can clearly show that any other special rule prevails, the Court will not admit it. That after considerable struggle and conflict of authorities, the courts in Bengal have held, that the rule of Hindoo Law in Bengal is different from that in force in the courts governed by the Metakshara, on the point in issue, and that a father has an absolute right to alienate either the whole or any portion of the ancestral estate; it is now, however, for the first time in the Sudder Court contended that the Law of Mithila is very nearly similar to that in Bengal, and that a father can alienate ancestral property, provided he leaves sufficient for the maintenance of the family; that this is an attempt to introduce into the Mithila law, what has, whether rightly or wrongly, been introduced into the Bengal law. That without the strongest evidence, the court will not do this; that in favour of the contention as to identity of the Mithila and the Metakshara laws, there are texts of the old Munis and passages in the commentators most approved in Mithila, the Vivada Chintamoni, Vivada Ratnacara, and others; precedents of this Court, such as that of the case of Sham Sing* *versus* Musst. Umraotee, and to crown all, we have the principle upon which the Hindoo Law

* Reports of selected cases, volume 2, page 74.

is universally founded. On the other side they have nothing; and in the absence of authority, they have recourse to bywustahs and to evidence as to custom; as to the latter, custom in the absence of written authority or positive law is admissible, but custom opposed to law, as in the present case, is of no avail at all, and as to the bywustahs, they, however learned the Pundits may be, cannot be opposed successfully to the positive ruling of this Court.

On the other side it is urged by Baboo Ramapersaud Roy, that the point is an important one, and has never yet been before the Court; that texts of Munis prove nothing, that the commentaries upon these texts are the authorities, and they unfortunately, as far as regards the Mithila law, have not been rendered into English; that the case in Macnaghten, volume 2, page 312, shows that according to the Mithila law, except his whole estate and his dwelling houses, what remain after the food and clothing of his family, a man may give away whatever it be, whether fixed or moveable; that again, the bywustah of the Pundit filed in the case speaks to the same effect; that custom, as proved by the evidence of transactions which have occurred in the family now litigating, and also by that of respectable persons, omlah of the court, vakeels and zemindars, is in favor of the unrestricted power of the father to alienate, provided he leave sufficient for the maintenance of his family, and consequently the decision of the principal sudder ameen should be affirmed.

In cases to which the reports of this Court do not furnish any authority, we are compelled to resort to bywustahs of learned Pundits, and it may be in some cases to evidence of local custom, but if the reports of the Court furnish us with an authority, and also the reasoning upon which the rule laid down conclusively, is based, we prefer being guided by it, and to leave less weighty authorities; at the same time we lament with the government pleader, that the chief authorities in Mithila law have not been rendered available, by being translated into English, to Judges unlearned in the Sanscrit language, and that we are thus, many of us at least, unable from our own scrutiny of the text to ascertain and vouch for the accuracy of the law as laid down by our predecessors in the court; in the present instance however, such scrutiny is the less necessary, as the case on which we intend to rely, was decided by that great authority in Hindoo Law, Mr. Colebrooke, and also by Mr. Fombelle, and had the bywustahs on which that judgment was founded been incorrect, they, subject as they were to the scrutiny of a profound Sanscrit scholar, would undoubtedly not have been adopted.

In the case of Shamachurn Singh *versus* Musst. Umraotee,* which is a Tirhoot case, governed by the law of Mithila, the

* Vol. 2, page 74, Select Reports

Pundit's bywustah accepted by the Court was to the effect that of Sud wany A "if a Hindoo possessing immoveable ancestral property, some time previous to his death, expresses himself in talking of his eldest son, to the effect that he will become sole proprietor on my death, and my younger son will be provided by him, with a suitable maintenance, the gift cannot take place from the omission of the word *dan* (donation) in the expression, which, both according to the shasters and the current practice of the country, is essential to complete the gift; further, supposing the *dan* (donation) to have been expressed in the above sentence, still the gift cannot be considered valid, *because a father and son possess an equal right in ancestral immovable property*, consequently the younger brother's right is established, and the estate becomes *joint property*, the gift of which is illegal, and a verbal gift, under any circumstances, of immovable property, unless supported by a hebbanamah, is invalid." The authorities, agreeably to which the bywustah has been delivered, are the Vivada Ratnacara, the Smrite Sanoochyn, Vivada Chundra, Vivada Chintamoni and other works current in Mithila.

Now it will be observed, that the particular case cited referred to gifts of the whole property, whereas in the present case we have only the sale of a portion; but notwithstanding this difference, the principle upon which the doctrine as to the former set of circumstances, is founded, applies to the latter, and the illegality of both is based upon the fact *that the father and the son in Mithila, as in the countries governed by the Metakshara, possess an equal right in ancestral immovable property.* Ancient law, including Hindoo law, as has been well remarked by a learned writer, * M "knows next to nothing of individuals, it is concerned not ancient "with individuals but with families; not with single human "beings but with groups; the mature Roman law, and modern "jurisprudence following in its wake, looks upon co-ownership "as an exceptional and momentary condition of the right of "property, but in India, this order of ideas is reversed. There "as soon as a son is born, he acquires a vested interest in "his father's substance, and on attaining years of discretion he "is even, in certain contingencies, permitted by the letter of the law "to call for a partition of the family estate; co-ownership in fact "is there the rule, and it may be conjectured that private property "in the shape we know it, viz., as that of individual, was chiefly "formed by the gradual disentanglement of the separate rights of "individuals from the blended rights of a community or family."

This principle of ancient Hindoo law appears, according to the precedents of this court above cited, to exist in the books of Mithila as well as the Metakshara; but the contention on the side of the defendant is, that as the Bengal law has developed itself,

and as the absolute right of the individual over ancestral property have been recognised in it, so it has become recognized in Mithila to the extent of allowing the father to alienate the whole ancestral property, with the exception of that portion which may suffice for the maintenance of his family; the only authority relied upon is the case at page 312, of the 2nd volume of Macnaghten's Hindoo law, but that case is a Nuddea case, and must refer to laws other than those current in Mithila, and the only point on which the Mithila law books are cited is as to the illegality of selling an entire patrimony without the consent of sons or other heirs, or without extreme necessity, a rule which is undoubtedly correct law, but which does not involve the question now particularly before the Court.

On the ground then of the fundamental principle of general Hindoo law, the principle of co-ownership of father and son, and the precedent of this Court above cited establishing it, we have no hesitation on the first issue in the present case of finding that under the law of Mithila, a father is joint-owner with his sons of the ancestral estate, and can only exercise the power of alienation in the case of a minor son existing at the time, as in the present instance, under circumstances of legal necessity.

It has been attempted to be shown us by the evidence of witnesses that the extravagances, on which the father of the minor, Bhugwutnaram Ram, were of the nature of dissipations, for which under Hindoo law, as being repugnant to good morals, the son would under no circumstances be liable; that therefore, on this ground the sale of the property in which the son has a vested interest is illegal; but we are not satisfied with evidence of this nature; all dissipation tends to extravagance, but all extravagances are not caused by dissipation repugnant to good morals in the Hindoo sense of that term, and nothing but the strongest and most reliable evidence as to the particular nature of the dissipation of the debtor, would justify our giving a verdict on the second issue in plaintiff's favour; and as no evidence of that kind is before us, we find for the defendant upon it.

We proceed to the consideration of the third issue.

On the part of the plaintiff, it is contended that on the plaintiff's grand-father's death, no debts were due by him, but he died worth large estates; and possessed of considerable ready money; that the yearly income of the plaintiff amounted to 30,000 Rs., a sum quite sufficient for all his wants; that, moreover, there were no great ceremonies in the family requiring large expenditure, and in point of fact, the family expenditure amounted to not more than 5 or 6,000 Rs. annually; that the sales for the reversal of which the present suit is brought, were made without legal necessity, merely to raise money to enable the plaintiff to indulge in an extravagant mode of living, or to satisfy bonds for which small

considerations had been given and decrees upon those bonds. The property sold being of a value far beyond the amount of the decrees; that granting even if plaintiff is unable to displace the sales which have taken place in execution of judicial decrees on the only ground on which a displacement would be legitimate, viz., the immoral purpose of the loan patent on the face of the decrees, still the other sales are liable to reversal as being made without any necessity, and not only were they made on the part of the vendor without any legal necessity under Hindoo law, but they have been purchased on the part of the purchaser without that enquiry and caution with a view to seeing that no breach of trust was committed, which a party, dealing with a person in the position of the plaintiff, a party a trustee with a restricted right of sale, should have used,* that considering the position of the father and that of the person purchasing, relations in most instances to each other, the latter, therefore, cognizant of all the circumstances of the family, it was incumbent on them as laid down by the Privy Council in the case of Hunooman Persaud Pandey *versus* Musst. Babooee Munraj Koonwaree, to prove the facts, presumably better known to him than to the infant heir, viz., those facts embodying the representation made to them of the alleged receipt of the sale of estates, and of the motives which induced the purchase, but nothing of this sort have defendants attempted to prove. That consequently, with the exception of the sale made in execution of decrees, all the sales should be reversed as having been made without authority under Hindoo law.

* Stronghill *vs.* Anstey De Gea. Macn ag ten and Go on, vol. 1, e 635.

It is urged by the pleader on the part of the defendants, that all the purchases, whether private or in execution, were made by them fairly at fair prices; that these purchases were made with a view of keeping the property in the family and preventing strangers coming in; that the statement made by the other side, that several purchasers purchased as Ruggonundun's servant is entirely incorrect; that Chedee Lall especially is a wealthy mahajun of Mozufferpore, and a creditor of Bhugwutnarain, and therefore he purchased; that the fact of the sales proves their necessity, and so nothing more is requisite, and that as purchasers, they could not be required to be prepared with proof of the antecedent, economy or good conduct of the owner of the estate; that they were not legally required to do more than they did do in the way of enquiry, and that therefore, the sales made on account of legal debts of the minor's father for which the minor is liable under Hindoo law, should be upheld.

That at the time at which the plaintiff's father came into possession of his property, it was altogether unburdened with debts, and that he was in the enjoyment of an income of at least 30,000 Rs., and with small family expenditure, seems from the evidence before us to be undoubted, and that the sales for the reversal of which the present suit is instituted all took place in the course of about 4

years, that is, between the end of 1849 and the beginning of 1854, seems clear also. The sales for the reversal of which the present suit is brought, divide themselves into 3 classes. 1st, sales made by order of court in execution of decrees. 2nd, sales made privately to satisfy decrees and bonds, and 3rd, sales made simply in order to raise money for some purpose or other. Freedom on the part of the son as far as regards ancestral property from the obligation to discharge the father's debts under Hindoo law, can be successfully pleaded only by a consideration of the invalid *nature* of the debts incurred. Now we are clearly of opinion, that the plaintiff has been unable to show that the expenses for which those decrees were passed, were, looking to the decrees themselves, and we cannot now look beyond these, immoral, and such as under Hindoo law, the son would not be liable for; we must, therefore, decline to interfere with the 5 sales, Nos. 25-26-27-28 and 29, which have taken place by the intervention of the courts for debts, which, though caused by extravagance, were such as a son would be liable for. The remaining sales fall under the other two classes, under the class of sales made to satisfy decrees and bond debts fall Nos. 3-4-14-16-18-22, and under the third class fall the remaining sales, Nos. 1-2-5-6-7-8-9-10-11-12-13-15-17-19-20-21-23-24. Now in sales made without the intervention of a court of justice when the vendor is a trustee for others as well as part owner, and the purchaser a stranger, such purchaser is, as contended for by the learned Advocate General, under an obligation to enquire and see that no breach of trust is by the Act of sale to him committed, when moreover, the purchaser is not a stranger, but a person knowing not only the position of the vendor, but the circumstances of the family, the obligation is stronger upon them of making such enquiry, and if the transaction, of whatever nature it may be, be afterwards called in question, the *onus* is clearly upon him of showing what those facts were which were represented to him, as raising the necessity, which was sufficient to justify it in his mind under the law applicable to the case.

After an attentive analysis of all the evidence placed before us by the defendants, we are unable to say, that any such proof of a satisfactory nature has been placed before us by them in this case, but the doctrine has been openly adopted by them that the sales themselves prove their own necessity; we think that this doctrine is altogether an erroneous one, and that on the simple failure by them to prove that they had made any enquiry as to the legal necessity of the sales in either class of cases under consideration, this case might at once be decided against them; but on referring to the evidence of the plaintiff, the nature of all these transactions at once becomes apparent, and also the fact, that they were all without exception entered into without any legal necessity, considerable sums in the aggregate were paid over to the debtor, for which bonds

to a large amount were given and decrees have been obtained on those bonds, and the transaction seems to have been part of a system entered into by certain parties, including the principal defendant, to ease plaintiff's father of his ancestral property by supplying his extravagances. The existence of a bond debt or a decree founded on, are neither of them as a general rule sufficient to warrant a private sale of property partly held in trust beyond the amount of the decree or bond debt without the intervention of the court, and it follows a fortiori, that where there are neither decrees or bond debts, the sale of trust property at all can, under no circumstances, except those of strict legal necessity, be upheld by the court.

Under this view of the case, we confirm the order of the lower court, reversing the sale of the dwelling houses by plaintiff's father, and also the deed of gift of the five villages alleged to have been made in his favor by his father also, and we declare, reversing the decision of the principal sudder ameen, that as far as concerns the rights in reversion of the minor plaintiff before us, the sales from Nos. 1 to 24 inclusive are null and void; as the plaintiff's father is still alive, plaintiff is not entitled to possession, and it will remain for the parties interested to determine amongst themselves, whether the transaction entered into shall stand good for the life-time of Bhugwutnarain, but with that determination the Court has at present no concern.

The Court also dismiss so much of the plaintiff's claim as refer to the sale of the five properties, 25 to 29, made in execution of decrees of court.

Under the special circumstances of this case, each party will bear his own costs.

Mr. C. Steer.—I concur in the view taken by my colleagues in this case.

THE 17TH JUNE 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 380 of 1860.

Regular appeal from the decision of Mr. Alexander Smith, Collector of Zillah Purneah, dated 27th March 1860.

Meer Mohummud Tuckee Chowdhry, (Defendant,) *Appellant*,

versus

Mr. A. J. Forbes, (Plaintiff,) *Respondent*.

Moonshee Ameer Ally and *Baboo Kishenkishore Ghose*, for appellant.

Baboo Ramapershaud Roy and *Mr. R. T. Allan*, for respondent.

Suit laid at Co.'s Rs. 25,000.

Held that on appeal from the orders of a collector passed

THE plaintiff in this suit applied to the collector of Purneah, for assistance in measuring his estate, the defendants having opposed him in the exercise of his right.

under sections 25, 26 and 27, Act X. of 1859, is to the Commissioner and not to the Civil Courts.

The collector, after satisfying himself that nothing in the engagements of the defendants entitled them to oppose the measurement, directed that it should proceed as provided by Section 26, Act X. of 1859.

The defendant first appealed to the Commissioner of Revenue against plaintiff's right to measure any lands held by him, but the Commissioner rejected the appeal on the ground of want of jurisdiction under the Act, the defendants have, therefore, preferred an appeal from the collector's order to this court.

The hearing of the appeal has been opposed by the respondent, who questions the authority of the court to hear an appeal from any *order* of a collector passed under Section 26 of the Act, and after hearing the arguments of the pleaders on both sides, we are of opinion that the objection is good.

We find it is provided by Section 151, of Act X. of 1859, that *all orders* passed by a collector under this Act *not* being judgments in suits, or orders passed in the course of suits and relating to the trial thereof, or orders passed after decree and relating to the execution thereof, shall be appealable to the Commissioner, and all such orders passed by a deputy collector shall be appealable to the collector, but no judgment of a collector or deputy collector in any suit, and no order of a collector or deputy collector passed in any suit, and relating to the trial thereof, or after decree and relating to the execution thereof, shall be open to revision or appeal otherwise than as expressly provided in this Act. And it is enacted by Section 160 that "in all suits other than those in which when tried and decided by a collector, the judgment of the collector is declared to be final (Section 153), or when tried and decided by a deputy collector an appeal is allowed to the collector, an appeal from the judgment of the collector or deputy collector shall lie to the zillah judge, unless the amount or putnee in dispute exceed 5,000 rupees, in which case the appeal shall lie to the Sudder Court.

It is clear from these two Sections, that some orders passed by a collector are appealable to the Commissioner, and some to the zillah judge or the Sudder Court, and the distinction appears to be, that when the order is a judgment or order passed in suit, or relating to the execution of a decree passed in a suit, it is appealable to the civil court, but if not a judgment or order relating to the trial of a suit or to the execution of a decree, it is appealable to the Commissioner of Revenue. It has been argued before us, that the term "suits" made use of in describing the different kinds of claims that are made cognizable by the revenue courts only, in the clauses of Sections 23 and 24 of the Act, properly mark the cases in which the judgments and orders passed by a collector are appealable to the zillah judge or the Sudder Court, and that the absence of such definition in Sections 25, 26

and 27 shows, that the matters therein referred to, are brought before a collector in the shape of an *application* for his *executive* aid and assistance, but do not require a judicial determination or judgment after a formal trial has been held by him; that consequently while an appeal to the zillah judge or to the Sudder Court is provided in all those suits in which a collector judicially determines a question of title or such matters as are brought before him *in the form* prescribed for suits under the Act, an appeal is allowed to the Commissioner of Revenue, when the case is one merely requiring his orders on the *application* of parties for the aid and assistance of his executive authority, and this view of the intention of the Act appears to us to be correct.

Accepting this distinction as valid, and applying this construction to the present case before us, which is an application to measure an estate under Section 26 of the Act, we consider the order passed thereon is not an order in a suit for which an appeal is provided to the zillah judge or to this Court, but is an order for the executive assistance of the collector, and as such, is appealable to the Commissioner. We, therefore, reject the appeal to this Court. But as the appellant had previously taken his appeal to the Commissioner, who, in our opinion, erroneously rejected it, we consider appellant is entitled to a refund of his stamp fees in this Court, which we accordingly direct shall be returned to him.

THE 19TH JUNE 1861.

H. T. RAIKES, C. B. TREVOR, and H. V. BAYLEY, ESQS., Judges.

Case No. 465 of 1858.

Regular appeal from the decision of Mr. A. Pigou, Judge of Moorshedabad, dated the 17th July 1858.

Rao Mohesnarain Roy, (Plaintiff,) *Appellant*,

versus

Ranee Foolcoomaree, (Defendant,) *Respondent*.

Baboos Kishenkishore Ghose, Unnodapersaud Banerjee, and *Obhoychurn Bose*, for appellant.

Baboo Ramapersaud Roy and *Mr. R. T. Allan*, for respondent.

THIS suit was brought for possession of lands and wassilaut, being valued at 7,868-2-3.

Plaintiff having pleaded dispossession under Act IV. of 1840, and the lower court having dismissed his suit as barred by limitation in consequence of his

It was once before brought up in appeal to this Court, and remanded on the 9th June 1857, to try whether or not the plaintiff was entitled to claim any remedy or was barred by lapse of time under the law of limitation.

The judge has now ruled, that limitation applies as the plaintiff has failed to prove, that he had been in possession of the lands at

Liability to prove possession within 12 years of suit, it was held, that as plaintiff *proved* possession of the lands at a time when the lands were made the subject of proceedings under Regulation II. of 1819, the possession at that time, although not within the limitation time, was sufficient to raise presumption that possession continued in plaintiff until the Act IV. proceedings, and as defendant also pleaded his own possession under similar resumption proceedings, but could not *prove* the fact, plaintiff's possession was held to have continued until the date assumed by him, as that of the cause of action and to bring him within time.

any time within twelve years previous to his bringing this action.

The appeal is to set aside this ruling, the plaintiff maintaining that he was in possession uninterruptedly, until wrongfully ousted under cover of an Act IV. of 1840 suit in 1851 A. D., and in the year following or 1852, brought this action.

It is unnecessary to give a detailed account of the circumstances of this case here, as this will be found in the printed mofussil decisions of 1855, and at page 1009 of the printed Sudder Decisions for 1859.

The plaintiff avers, that he is the proprietor of Kantanuggur, a village formerly washed away and re-formed on its original site and that the lands in suit were measured with a view to resumption proceedings, and are described in No. 9 dagh of the measurement papers. That the lands were ultimately released to plaintiff in 1836, and remained in his possession until the defendant, the proprietor of Hummitnuggur, raised a dispute regarding 25 beegahs of land under Act IV. of 1840, and under color of the orders passed by the Magistrate in execution of an award for that quantity of land, contrived by the aid of the Police, to oust plaintiff in 1851 from possession of more than 1200 beegahs, constituting the lands now in suit.

The defendant denies all averments made by the plaintiff, and alleges that the lands appertain to his village of Hummitnuggur were measured and released to him as such by the revenue authorities, from which time he has continued to hold them.

After hearing the statements of the vakeels on both sides, and perusing a great deal of the evidence on the record, it became apparent to us, that we had only to consider whether the evidence was sufficient to prove, that the lands now in contest were the same as had been recorded in dagh No. 9, of the measurement undertaken when proceedings were pending against the plaintiff under Regulation II. of 1819. For if so, it would clearly follow, that plaintiff must at that time have been in possession of the lands, and there was nothing on the record to bar the presumption that plaintiff's possession had continued uninterrupted until he was dispossessed by the defendant under proceedings had by him under Act IV. of 1840. That moreover, the proof on this point, if satisfactory, was sufficient to bring plaintiff's suit within time, for as the defendant, while alleging his own title, was established by similar proceedings before the revenue authorities relative to his village of Hummitnuggur, had produced no papers whatever in support of his assertion, it appeared to us that if plaintiff established the fact of these lands having been measured and recorded in his possession so far back as 1856, as part of Kuntanuggur, that fact would be *prima facie* evidence of his right and title to keep the same until better proof of title could be adduced against him, and as defendant has failed

as to proof altogether, plaintiff's *prima facie* case would entitle him to a decree.

We accordingly turned our earnest attention to ascertain whether the chitta No. 9, identified the lands in dispute or not. With reference to this point we were shewn, that when the suit was originally filed, it was before the principal sudder ameen of Moorshedabad, whose attention had likewise been directed to the importance of ascertaining the exact locality of dagh No. 9, and comparing it with the locality claimed by the plaintiff, and with this object he had himself proceeded to the spot in 1855, and traced out the boundaries of dagh No. 9, and recorded their position with reference to the lands in dispute.

Subsequent to this enquiry, the case was removed to his own file by the judge, and when that officer passed a decision on the merits in 1855, he based his judgment in favor of plaintiff on the proceedings of the principal sudder ameen, as recorded by him on the enquiries conducted on the spot in January 1855.

This local enquiry resulted in the principal sudder ameen's recording, that the land now in dispute formed a portion of the lands measured as dagh No. 9, in the case under Regulation II. of 1819, but as the pleaders of the respondents questioned the interpretation put by us, and by the other side upon the principal sudder ameen's proceedings detailing the result of his local enquiry in 1856, we despatched a precept to the judge of Moorshedabad directing him to examine the principal sudder ameen on oath, in the presence of persons appointed by the present litigants and ascertain from him, whether or not he had been able to trace the boundaries of dagh No. 9, so as to identify its position, and whether the lands so identified corresponded with the lands in suit.

The result of this examination has been a clear statement on the part of the principal sudder ameen that he had been able to trace the boundaries of dagh No. 9 on the east, west and south sides, but not on the north, where it joined the land held by the proprietor of Hummitnuggur, but that the amount of land recorded in the chitta was calculated by its being 84 russees in length and from 6 to 25 russees in breadth.

We have no hesitation, therefore, in adopting the report of the principal sudder ameen as conclusive of the fact, that the lands of dagh No. 9 and those in dispute, are identical, and consequently that plaintiff is entitled to have a decree in his favor. Some discussion took place as to the extent of the lands to be decreed to the plaintiff, as some portion of the lands of the dagh is admittedly in plaintiff's possession already, and there being no defined boundary on the north, where the disputed lands abut upon the lands of defendant's estate, a difficulty might be experienced hereafter to giving possession under the decree. We, therefore, d the plaintiff the

lands claimed by him, or 1210 beegahs with dams, &c., in the lands comprised in dagh No. 9, of the measurement chittas alluded to above, with wassilaut from date of suit, to be ascertained in execution, with all costs of suit.

8-10-35